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(18,903.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 264.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA *EX REL.* WILLIAM A. KETCHAM, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 THE STATE OF INDIANA:

In the Supreme Court.

Be it remembered, that heretofore, to-wit: on the 5th day of October, 1901, the same being the 114th judicial day of the May term 1901 of said court, the Terre Haute and Indianapolis Railroad Company, by John G. Williams, Samuel O. Pickens, and Lawrence Maxwell, Jr., its counsel, filed in the office of the clerk of the supreme court of Indiana, a transcript of the record and proceedings of the Marion superior court of said State, in a cause wherein The State of Indiana, on the relation of Wi liam A. Ketcham, attorney general, was plaintiff, and the said The Terre Haute and Indianapolis Railroad Company was defendant, together with an assignment of errors endorsed thereon; which transcript and assignment of errors is in the words and figures following, to-wit:

2 *Be it remembered*, that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, &c., in the superior court of the county of Marion, State of Indiana, are the following in the cause of

THE STATE OF INDIANA on the Relation of WILLIAM A. Ketcham, Attorney General,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMpany and Volney T. Malott, the Receiver Thereof. } No. 54555.

And be it also remembered, that heretofore, to-wit: on the 22d day of April, 1897, the above named relator filed in the office of the clerk of said superior court a complaint against said defendant in these words, viz:

3 STATE OF INDIANA, } *ss*:
Marion County, }

In the Superior Court of Marion County, May Term, 1897.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. —.

Complaint.

The State of Indiana, on the relation of its attorney general, William A. Ketcham, for the use of its common schools, complains of

the defendant, The Terre Haute & Indianapolis Railroad Company, and says:

That heretofore, to-wit: on the 26th day of January, 1847, the State of Indiana passed an act incorporating the Terre Haute & Richmond Railroad Company, and granting to it a charter to construct, maintain and operate a certain railroad, a copy of which said act and charter is filed herewith, and hereof made a part, designated as "Exhibit A," section- 22, 23, 24, and 35 thereof being as follows:

4 "SEC. 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road, or any part thereof, as shall be for the interest of said company, and to charge, lower or raise at pleasure: Provided, that the rates established from time to time shall be posted in some conspicuous place or places on said road.

SEC. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

SEC. 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses; and the directors may retain such proportion of the profits as a con-

5 tingent fund to meet subsequent expenses as they shall deem proper.

SECTION 35. The corporation shall caused to be kept a fair record of the whole expense of making and repairing said railroad, and of each section thereof, with all the incidental expenses and also a fair account of the tolls received; and the State shall have the right to purchase the stock of said company, at any time after twenty-five years, paying to said corporation a sum of money, which, together with the tolls received, shall equal the cost and expenses of said railroad as aforesaid, with the interest of ten per centum per annum; and the books of said company shall always be open for the inspection of any agent of the State, appointed for that purpose by the legislature, and upon any refusal to exhibit their books and

accounts to said agent, upon request made to the president all powers granted by this act shall cease."

The plaintiff further avers that thereafter, to-wit: on the — day of ——, 1848, and before the completion of said road, at the instance and procurement, and with the consent of said road, said section 35 was repealed: but said section is here referred to and made a part hereof for the purpose of arriving at the true construction to be given to section 23, which, with the remainder of said sections, 22 and 24, remained in full force and unamended and unrepealed, except that the General Assembly for the State of Indiana, by an act approved on the — day of February, 1897, amended such section 23, so as to read as follows:

"SECTION 23. That when the aggregate amount of dividends declared or earned received in excess of the operating expenses of said road shall amount or shall have amounted to the
6 full sum invested in the construction of said road with ten per cent. interest per annum thereon, the General Assembly may so regulate the tolls and freights that not more than fifteen per centum per annum upon the amount invested in the construction of said road shall be divided on the capital so invested in such construction, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum upon the actual capital that has been invested in said road shall not be made; and it shall be the duty of the corporation to furnish the General Assembly, from time to time, whenever required, with correct statements of the amount of its expenditures, not only in the construction of said road, but also in the operation thereof, and the amount of profits after deducting all operating expenses, which statements shall be made under the oath of the officer or officers, whose duty it shall be to make the same; and at all times after the aggregate amount of the dividends declared shall amount, or shall have amounted to the sum used in the construction of said road and ten per centum thereon, the surplus profits after reserving for division, or after making dividends at the rate of fifteen per centum per annum, and after reserving such reasonable proportion as may be necessary to provide for future contingencies shall be semi-annually, on the first Monday in July and December of each year, paid over to the treasurer of State for the use of common schools. And the General Assembly may, from time to time, as it may deem expedient, take such steps as it may deem necessary to compel said railroad company to comply with the provisions of this section as herein amended, and to account for and pay over said moneys and said excess of profits to said treasurer of State for the use of said
7 schools, and whenever said General Assembly shall require an accounting from said railroad company such accounting shall cover the entire period covered by the operation of said road from its acceptance of its charter up to and including the period when said railroad company may have accepted the provisions of the general railroad law of the State. And the right of the State upon such inquiry or upon any suit that may be authorized to

compel such accounting shall be the same as though this amendment had been originally a part of the charter of said railroad and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the State; provided, however, that nothing in this act contained shall be in any wise construed as lessening, impairing or releasing in any manner any right of or any liability to the State of Indiana by reason of anything contained in said original charter; all of which rights and liabilities are expressly reserved to said State as fully as though this section had not been amended,"

The plaintiff further shows to the court that thereupon after the incorporation of said railroad company and the granting of said charter, the persons therein named organized said corporation and accepted and assumed to exercise the corporate franchises vested in them by said acts, and from the time said corporation has and it does yet exist under the laws of the State of Indiana. But afterwards, by an act, approved March 6th, 1865, the General Assembly of the State of Indiana changed the corporate name of the said corporation to the Terre Haute & Indianapolis Railroad Company, which change was accepted by said company, and said corporation has ever since been and still is known by said last name.

8 That thereupon said corporation proceeded in accordance with the franchises accorded to it to erect, construct and maintain a railroad from the city of Terre Haute, eastwardly through Terre Haute to Greencastle, to Indianapolis in the county of Marion, said road being opened in part for operation, but not fully constructed during the year 1852, and additional work was done in the construction thereof from time to time until the year 1866, when said road was fully completed, but the same was opened for operation and operated continuously from the year 1852 forward. That after March 6th, 1865, in accordance with an act of the General Assembly, said road was completed to a point on the western line of the State, from Terre Haute, but the cost of such extension was paid out of the earnings of the road, and from money borrowed upon the bonds of the company, which were afterwards paid out of the earnings of the road.

By said charter said corporation was given the right to charge and receive such tolls and freights for the transportation of persons, commodities, &c., on said road, as might be deemed for the best interests of the company, and to change and lower them at pleasure, except only as to the provision in section 23 of said charter, reserving a power in the General Assembly to regulate such tolls and said corporation was also by its charter required to declare and pay to the stockholders in money, the semi-annual dividends of all of the net profits of the earnings of the road, less only such portions thereof as the directors at the time of declaring such dividends might deem it necessary to retain as a contingent fund to pay subsequent expenses.

It was further provided in said 23rd section of said charter that

when the aggregate dividends declared should amount to
9 the full sum invested and ten per centum per annum thereon, the legislature might or should so regulate the tolls and freights that not more than fifteen per centum per annum should be divided on the capital employed, and that the surplus profits if any after paying the expenses and reserving such portion as might be necessary for future contingencies should be paid over to the treasurer of State for the use of common schools.

The plaintiff says that the money invested in the construction of said road was raised by stock subscriptions, by the sale of stock by the company, and by issuing and selling bonds of the company, some of which bonds so issued were afterwards by the holders thereof converted into or exchanged for stocks of the company, and when so converted they represented in the hands of the stockholders a part of the cost of the road to the company, and prior to such conversion they represented a loan to the company, and the interest thereon was paid out of the net earnings of the road.

Plaintiff further shows that exclusive of the moneys borrowed by said corporation, which *was* afterwards repaid out of the earnings, or out of the proceeds of the sale of bonds, there *was* expended in the construction of said road in the several years up to and including the year 1866, the following sums, to-wit:

In the year	1849	the sum of			$102,911.19
" " "	1850	"			128,256.47
" " "	1851	"			131,095.18
" " "	1852	"			270,124.25
" " "	1853	"			106,262.90
" " "	1854	"			185,450.00
" " "	1855	"			50,700.00
" " "	1856	"			108,050.00
" " "	1857	"			62,000.00

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In the year	1858	the sum of			20,000.00
" " "	1860	"			5,000.00
" " "	1862	"			59,000.00
" " "	1863	"			57,000.00
" " "	1864	"			6,000.00
" " "	1865	"			28,000.00
" " "	1866	"			5,000.00

So that by the year 1866 the total cost of construction except as represented by the bonded indebtedness paid thereafter out of its earnings, amounted to $1,344,850, and the said sum represented and represents the entire cost of construction of said road. That during the period from 1852 when said road was first opened and operated, to the year 1873, when it accepted the general railroad law of the State as hereinafter set forth, the net earnings received by said road during said several years were as follows:

For the year	1852	the sum of	.....	$171,446.05
" " "	1853	"	.....	211,644.60
" " "	1854	"	.....	259,323.39
" " "	1855	"	.....	289,702.76
" " "	1856	"	.....	471,496.98
" " "	1857	"	.....	306,078.67
" " "	1858	"	.....	286,823.75
" " "	1859	"	.....	282,154.86
" " "	1860	"	.....	317,381.55
" " "	1861	"	.....	316,183.95
" " "	1862	"	.....	461,272.66
" " "	1863	"	.....	545,274.43
" " "	1864	"	.....	521,254.40
" " "	1865	"	.....	698,670.79
" " "	1866	"	.....	431,101.10
" " "	1867	"	.....	501,706.71

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For the year	1868	the sum of	.....	604,418.89
" " "	1869	"	.....	443,221.36
" " "	1870	"	.....	550,465.05
" " "	1871	"	.....	410,933.11
" " "	1872	"	.....	443,267.81
" " "	1873	"	.....	443,267.81

Plaintiff further avers that the said railroad company, defendant, in violation of the 24th section of its charter, did not make semi-annual dividends of all the profits received in the operation of its road, as by said section required; but on the contrary wrongfully and unlawfully withheld from time to time large sums of money out of the net earnings of the road over and above what was reasonably necessary as a contingent fund to pay subsequent expenses, and in violation of its charter, of the moneys so withheld, invested the same from time to time in United States bonds, in the stocks and bonds of other railroads, both within and without the State of Indiana, in city bonds and in the purchase of its own stocks from individual holders thereof, amounting in the aggregate to the sum of to-wit: $3,000,000, which said investments and purchases of stocks were not made for the purpose of aiding in the construction of lateral roads to the line of defendant's road, but for the fraudulent purpose of withholding so much of the net earnings received from the operation of the road from dividends to be declared in order to prevent such dividends from reaching an amount equal to the full sum invested by said company and ten per centum per annum interest thereon; and for the purpose of preventing the time from being reached when the State might legislate to regulate the tolls and freights of said company, and to evade and defeat the force and operation of the 23rd section of the charter of said
12 company, and to cheat and defraud the State and the common schools thereof, and for the purpose and with the same intent said railroad company, defendant, in addition to the moneys in-

vested as aforesaid, withheld from the net earnings of the road, year by year, other large sums of money over and above a reasonable contingent fund, amounting in the aggregate to, to-wit: $2,000,000, as a surplus fund, and for the purpose of preventing legislation to regulate the tolls and freights of the company, and for the purpose of cheating and defrauding the State, the defendant in violation of its charter, unlawfully increased its capital stock by converting the bonds that had been theretofore issued to represent a loan of money, and which were paid off or purchased with the net earnings of the road into stocks to the amount of, to-wit: $50,000; and also by issuing stocks to the amount of $5,000 to represent bonds supposed to be lost, and by placing said stocks in the hands of Chauncey Rose, he being then and there the president of said railroad company, but in fact as trustee for the company, and said company thereupon thereafter from time to time declared and paid dividends upon such stock and entered the dividends to the credit of the company; and said company also from time to time issued stock dividends to the stockholders, amounting in the aggregate to the sum of to-wit: $600,000 for the further fraudulent purpose of preventing the time from arriving when the General Assembly might regulate the tolls and freights, by having it thus appear that the stock so issued and outstanding represented, to that extent, the cost of the construction of said road. And the defendant falsely and fraudulently represented and held out, by its printed reports and otherwise, that the capital stock of said company amounted to $2,015,000, and that the
13 defendant had that amount invested in said road, and that the amounts invested at the close of said several years were as follows:

In the year	1852	the sum of			$632,367.
" "	1853	"	"		738,650.
" "	1854	"	"		924,100.
" "	1855	"	"		974,800.
" "	1856	"	"		1,082,850.
" "	1857	"	"		1,376,450.
" "	1858	"	"		1,381,450.
" "	1859	"	"		1,381,450.
" "	1860	"	"		1,381,450.
" "	1861	"	"		1,440,450.
" "	1862	"	"		1,517,450.
" "	1863	"	"		1,900,150.
" "	1864	"	"		1,928,150.
" "	1865	"	"		1,928,150.
" "	1866	"	"		1,983,150.
" "	1867	"	"		1,988,150.
" "	1868	"	"		1,988,150.
" "	1869	"	"		1,988,150.
" "	1870	"	"		1,988,150.
" "	1871	"	"		1,988,150.
" "	1872	"	"		1,990,150.
" "	1873	"	"		1,990,150.

Whereas, in truth and in fact, the amount invested in said road by said company was at no time greater than $1,344,850, as hereinbefore set forth. And the true amount of the capital stock, except as the same was from time to time fraudulently increased, was only $1,344,850.

Said illegal increase of the capital stock and false repre-
14 sentations as to the amount thereof, and as to the aggregate amount invested, and as to the amounts at different times invested in said road, as so given out by said road through its printed and published reports and otherwise, were each and all made for the purpose of defrauding the State and the common schools thereof, and of making the amount invested, together with ten per centum per annum interest thereon always appear to be in excess of the net earnings of the road; and for the same fraudulent purpose said defendant charged up to the account of investments of the company in the road the whole of the construction account; that in fact a large portion of said construction account was at different times made up of money borrowed upon bonds of the company and used in the construction of the road, and the interest thereon was from time to time, as it fell due, paid out of the earnings of the road, and the principal eventually all paid out of the earnings of said road, prior to the year 1873; but such entries were so made for the purpose of making it appear that the stockholders of said company had invested that amount of money therein, and that the whole of said sum should be treated as a part of the sum upon which the cost with ten per centum was to be returned to the investors and upon which the dividends at the rate of fifteen per centum per annum should be made before the State would be permitted to regulate its tolls and in order to prevent any portion of the earnings of said road being paid over to the treasurer of State for the use of common schools, and for the purpose of keeping the State and the General Assembly thereof in ignorance and deceived as to the true condition of the financial affairs of the company, and for the purpose of enabling said company to make such a showing as that the investment of the company and ten per
15 sentum per annum interest thereon might appear to be greater than the net earnings, and that it might at no time appear that the time mentioned in the 23rd section of the charter, when the State might regulate the tolls and freights, had been reached.

The defendant after having purchased shares of the company from individual holders thereof, at a cost of $550,000, instead of retiring said stocks and reducing the amount invested, placed the same in the hands of the president of the road, but as trustee for the road, and thereafter declared dividends thereon in the hands of said trustee to the credit and for the benefit of said company, and continued falsely to hold out by its printed and published reports, its books and otherwise, said stocks as representing that amount invested by said company in the construction of said road.

Plaintiff further charges that the defendant falsely and fraudu-

lently represented that the investment of the company and ten per centum per annum interest thereon was always in excess of the earnings of the road; whereas, the truth is that as early as the year 1858 the net earnings of the road had largely exceeded the investment and ten per centum per annum interest thereen, and still exceeds such cost of construction with such interest thereon, by more than $3,000,000; all of which was done to prevent the General Assembly from legislating to regulate the tolls and freights of said company and to defraud the State and deprive the common schools thereof of the revenues that by section 23 it was designed and intended should be provided.

Plaintiff further shows that in furtherance of its design to so conduct its business as to keep concealed from the State and the General Assembly thereof knowledge as to its true condition,
16 and the fact that the time had arrived, or was about to arrive, when the General Assembly might, and should under section 23 of its charter, regulate the tolls thereof, and might take such further steps as should appear to the General Assembly necessary and proper to compel the payment of moneys to the treasurer of State for the use of common schools, the defendant railroad company, by its board of directors, subscribed and invested in the stocks of the Evansville & Crawfordsville Railroad Company to the amount of $24,489.89; and in the year 1860, invested the further sum of $105,000; and in April 1862, the further sum of $50,000 in the Cincinnati & Indianapolis Railroad Company; and in March, 1862, in the bonds of the St. Louis, Alton & Terre Haute Railroad Company, the sum of $85,696; and during the year 1878, said defendant used of its earnings in loans and advances to the St. Louis, Vandalia & Terre Haute Railroad Company, the sum of $191,258.47; and during the same year invested in the bonds of the Nashville & Henderson Railroad Company the sum of $42,500; and during the year 1869 in the stock of the St. Louis, Vandalia & Terre Haute Railroad Company, the further sum of $265,000, and during the year 1868, '69 and '70, in the bonds of the St. Louis, Vandalia & Terre Haute Railroad Company, the further sum of $460,400, and in the year 1870, in the stock of the Terre Haute & Chicago Railroad Company the further sum of $50,000.

All of which investments were made by said defendant railroad company for the purpose of concealing from the State of Indiana and the General Assembly thereof, the true earnings of said road, and of thereby preventing said General Assembly from ascertaining the fact that the time had arrived when under the terms of said charter, the General Assembly was at liberty to regulate the
17 tolls and income of the road and to require to be paid to the treasurer of State for the use of its common schools the sums so by said charter required to be paid.

And plaintiff further charges that between the year 1869 and prior to the 17th day of January, 1873, with a like purpose and intent, said defendant invested other large sums of money in other companies, and their stocks and bonds; but the particulars thereof

the plaintiff, at the time of exhibiting this, its complaint, is unable to assert, but prays that when the facts in that respect are ascertained, it may have the benefit thereof, as though it had been formally pleaded.

Plaintiff further shows that during the year 1867, the said defendant railroad company, out of the net earnings of said road arising from its operations, purchased 5,872 shares of the par value of $50 of the stock of said company, then in the hands of the stockholders of said company, and paid therefor the sum of 1.81 on the dollar; said purchase amounting in all to $531,416, and then and there caused the said stock to be transferred to Chauncey Rose, the then president of said company, but as trustee of said company, which stock was thenceforth, until the 17th of January, 1873, and thereafter held by said Rose as such trustee; that during that period dividends were declared and paid on said stock.

Plaintiff further avers that during the year 1850, a stock dividend of 20 per centum was issued by said company, and said certificates of stock therefor were issued to the then stockholders of said company, amounting in the aggregate to $211,600, and thereupon said sums so divided and distributed were by said company distributed to the construction account, as though said moneys had been
18 invested by the stockholders in the construction of said road, when in fact the moneys were not so invested, but simply represented so much net earnings received by the road from its operation, and such charge to the construction account was made in order to increase the apparent cost of the construction of the road, and to keep the State and General Assembly thereof in ignorance of the fact that the time had arrived or was about to arrive when it might, under section 23, legislate with respect to the tolls and income of said road, and make provision for the payment to the treasurer of State for the use of common schools of the excess of earnings over and above fifteen per centum per annum to be divided among the stockholders, and thereafter in the year 1864, said defendant company made, declared and delivered to the several stockholders of said company, a further stock dividend on their stock of 25 per centum, amounting in the aggregate to the sum of $376,700, and thereupon the defendant railroad company caused the same to be entered as though that sum of money had been expended in the construction of said road, for the fraudulent purpose in each of said instances of deceiving and defrauding the State and the General Assembly thereof, and making it appear that the time had not arrived when under section 23 of said charter, the General Assembly might regulate the tolls and freights of said company, and for the further purpose of preventing legislation to compel the payment of the amount in excess of fifteen per centum per annum on the amount invested in the construction of said road to the treasurer of State, for the use of common schools.

That the defendant road, from time to time, claimed, pre-
19 tended and represented in its published reports and otherwise, that it had paid dividends to persons claiming to be and

who the defendant road falsely and fraudulently represented were actual *bona fide* stockholders in the stock of said company, on the amount of $1,988,150, when in truth and in fact they should have paid dividends only on the sum of $1,344,850, upon which dividends might have been lawfully declared and paid, and for the last fifteen years of its existance prior to 1873, said defendant retained out of the net earnings of said road and withheld from the stockholders large sums of money more than necessary to meet subsequent expenses and which moneys have never been accounted for.

Plaintiff further shows that at the various sessions of the General Assembly of the State, notably those held in 1865, 1867, 1869, 1871, and thereafter, when committees were appointed by the General Assembly to investigate the affairs of said railroad company, and when measures were under consideration looking to the investigation of said company for the purpose of ascertaining whether the time had arrived when the legislation might be enacted to enforce the rights of the State under said 23rd section, and while these committees and said General Assembly had in charge the investigation of, and were attempting to investigate the financial condition of said company, and particularly the question of the rights of the State as connected therewith, said defendant railroad company fraudulently and corruptly laid out and expended large sums of money to members of said committees of the General Assembly for the purpose of influencing the action of said committees and to said other members for the purpose of preventing reports from being made as to the true condition of affairs of said road, and to prevent any legislation looking to the regulation of the tolls or to the enforcement of any of the rights of the State in that behalf, and especially to prevent any further action by the General Assembly in whom alone was reserved the right in that behalf to require steps to be taken to require an accounting, or to require moneys to be paid over to the treasurer of the State for the use of common schools; and at and during said sessions of the General Assembly said defendant railroad company laid out and expended large sums of money to officers of the General Assembly, and to other persons to the plaintiff unknown, to influence members of the General Assembly to act for and in the interest of said railroad company, and against the interests of the State and of the common schools thereof. And during the session of the 45th General Assembly in the year 1867, while a committee of the senate and house of representatives was at Terre Haute charged with the duty of investigating the affairs of the defendant company, and looking after the interests of the State, the defendant by its officers and directors took charge of said committees for the fraudulent and corrupt purpose of influencing them to act in the interest of the corporation against the State and to prevent investigation into the accounts of said company, and for this purpose said company and its officers, agents and employés, in that behalf, furnished to said committee free transportation to and from Terre Haute, paid their bills while there, furnished them with intoxicating liquors, and got them into such condition that they were

unfit to make any investigation of the affairs of said railroad company, or to transact any business, and by reason of such conduct said railroad company did from time to time prevent investigation and legislative action to enforce the rights of the
21 State.

Plaintiff further avers that each and every of the acts hereinbefore set forth and complained of were done by the defendant company for the purpose of keeping concealed from *from* the State and the General Assembly, the knowledge that the time and situation had arrived upon which the State could and should interpose to regulate the tolls and freights of the defendant company, and that by the acts and doings of the defendant company the said defendant did prevent the State from ascertaining and knowing that the profits realized exceeded the cost of said railroad to the stockholders, and ten per centum per annum interest thereon, and did thereby prevent the State and the General Assembly thereof from obtaining the knowledge and information necessary to place it in a condition in which it could interpose to regulate said tolls and freights and that but for said fraudulent acts of said defendant company the General Assembly of the State should have interfered and regulated the tolls and freights of said company, as it was authorized to do by the terms and provisions of said charter, and would have made provision requiring the payment of the excess over and above the fifteen per centum per annum permitted to be divided among its stockholders, to be paid to the treasurer of State for the use of common schools.

Plaintiff further avers that thereafter, to wit: on the 17th day of January, 1873, the defendant company, having succeeded in preventing the State from theretofore providing by legislation for the regulation of its tolls and freights, and having succeeded in issuing said large amount of stock, did file its written acceptance with the Secretary of the State of Indiana, of the general laws of the
22 State touching railroads, intending and contriving thereby to prevent any effort on the part of the General Assembly to regulate its tolls and freights, and to prevent any legislation to enforce the payment to the treasurer of State for the use of common schools, of any portion of the net earnings in excess of the fifteen per centum per annum authorized to be divided among its stockholders.

Plaintiff further avers that thereafter, to-wit: on the — day of ——, 1875, the then attorney general of the State filed in the superior court of Marion county, Indiana, his certain complaint upon his own relation against said defendant, after it had accepted the general railroad law of the State, copy of which complaint is filed herewith and made a part hereof, designated as "Exhibit B," and such proceedings were had in said cause that the defendant company appeared to said action, and filed its demurrer to said complaint, a copy of which demurrer is filed herewith and hereof made a part, designated as "Exhibit C." And thereupon the court being advised in the premises sustained said demurrer, and the plaintiff

refusing to amend its complaint and electing to abide thereby, judgment was rendered against it, that it take nothing by said action, copy of which judgment is filed herewith and hereof made a part, designated as "Exhibit D."

Plaintiff further shows that at the time of filing said complaint, the attorney general of said State had not been notified by the clerk of said superior court of the filing of said complaint, nor had he been required by the governor of State or a majority of the officers of the State in writing to prosecute said action, and neither prior to the filing of said complaint nor at the time, had the General
23 Assembly of the State directed any action to be taken by said attorney general; nor had said General Assembly regulated or attempted to regulate the tolls or freights; nor had said General Assembly required said railroad company to furnish it with a correct statement of the amount of expenditures or the amount of profits after deducting all expenses; nor had said defendant company made to said General Assembly any statement whatever whether under oath or otherwise, of the expenditures or the receipts, or of the condition of said railroad company, and said suit was instituted without any authority whatever from the governor or the State officers, and especially without any authority of any kind, character or description from the General Assembly; and by reason of the false devices and contrivances of the defendant in that respect, as hereinbefore alleged, the General Assembly was at that time in ignorance of the true condition of the expenses of the cost of construction, the expenses of operation of said road and of the gross and net receipts thereof; and plaintiff avers that said action was instituted and sought to be prosecuted by the then attorney general without authority of law whatever, therefore said court was without lawful jurisdiction to entertain said writ, and the proceedings and judgment therein were and are of no force or validity to bind the State of Indiana.

Plaintiff further avers that by an act approved on the 27th day of January, 1897, the General Assembly of the State of Indiana, required the defendant company to make to it on or before the 6th day of February, 1897, a true statement of the cost of construction, the operating expenses of said road, together with its gross and net receipts so that it might be advised as to what steps if any, should be taken to enforce the rights of the State. That in pre-
24 tended compliance with this law, the defendant through its then officers, did make upon information a certain pretended statement or showing of the cost of construction, the expenses of operating said road and the gross and net receipts from such operation; but said statement only purported to be upon information and not upon the knowledge of the officers making it, and said statement showed that the details thereof could not be given because of the fact that the books professing to show such facts were not in the possession of said company. Therefore, the plaintiff did, by an act approved on the 18th day of February, 1897, amend section 36 of the act of May 11, 1852, as follows:

"SECTION 36. All existing railroad companies may acquire all the powers or benefits conferred by this act, by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company, and the acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act, and thereupon such company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified, as fully as they would have had and been if organized under this act: Provided, however, that whenever any railroad organized under any special charter granted by the State of Indiana, shall hereafter accept or shall have heretofore accepted the provisions of the general railroad laws as embodied in said act approved May 11th, 1852, all rights and liabilities whether inchoate or complete, in favor of the State of Indiana, shall be and they are hereby expressly reserved to said State notwithstanding such acceptance, and said State may hereafter, by approprate legislation, make such provision for the determination and enforcement of said rights as the General Assembly may deem appropriate, and notwithstanding such acceptance any and all provisions of said charter may be amended, revised, repealed, or added to as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May 11th, 1852."

And thereafter, by an act approved on the 24th day of February, 1897, did in like manner amend section 23 of said charter, in accordance with the terms and provisions of said charter, said section as amended being as hereinbefore set forth.

And thereupon afterwards said General Assembly did, by an act approved on the 4th day of March, 1897, appropriate for the use of common schools the net earnings of said defendant, after dividends amounting to fifteen per centum per annum from and after the time when the earnings of said road had amounted to an amount sufficient to repay the cost of construction, with interest thereon at the rate of ten per centum; and it also required that the said defendant company should account to the relator herein for the use of the common schools of the State of Indiana for such net earnings so in excess of said dividends of fifteen per centum, and did authorize and require of the relator herein to demand and enforce such accounting by proper proceedings in court, and thereupon afterwards, to-wit: on the 13th day of March, 1897, the plaintiff by its attorney general, being thereunto duly authorized and empowered, did demand of the defendant company an accounting of said net receipts so in excess of said fifteen per centum from and after the time when the cost of construction with ten per centum thereon had been earned, and did demand that the same should be paid over to said attorney general for the use and benefit of the common schools; but so to do the defendant wholly failed, neglected and refused.

Plaintiff further charges that if the account were properly taken a large balance, to-wit, a balance in excess of $3,000,000, would be due and owing to the plaintiff for the use of its common schools.

Plaintiff therefore prays that an account may be taken by and under the direction and decree of this court that in taking said account it may be ascertained what was the true cost of the construction of said railroad, and at what time the net earnings of said railroad had equalled such cost of construction, together with interest thereon at the rate of ten per centum per annum, and what amount from and after that time there was of the net earnings of said road in excess of fifteen per centum upon the cost of such construction. That in taking said account the defendant may not be allowed to take credit for any sum of money not actually expended in the construction of said road, and especially that all watered stock, and all stocks purchased with the moneys of said company may be eliminated therefrom, and that upon the amount being ascertained a decree be rendered in favor of the plaintiff therefor, to-wit: for the sum of three million dollars. And plaintiff prays for such other and further relief as may be proper in the premises.

WILLIAM A. KETCHAM,
Attorney General of Indiana.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Of Counsel.

27 EXHIBIT "A."

An act to incorporate the Terre Haute and Richmond Railroad Company, approved January 26, 1847.

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That Chauncey Rose, Samuel Crawford, E. M. Huntington, James H. Turner, W. W. Reynolds, J M. Millikin, James Farrington, Thomas J. Bourne, and R. W. Thompson, of the county of Vigo, and State of Indiana, and their successors in office, duly elected as hereinafter provided, are hereby constituted a body corporate and politic, by the name of "The President and Directors of the Terre Haute and Richmond Railroad Company," and by such name shall be capable to sue and be sued, plead and be impleaded, answer and be answered unto, either in law or equity in any court of competent jurisdiction within this State; and shall have power to make and use a common seal, and the same to alter at pleasure, and to make contracts and enforce the same, and to establish and put in force such by-laws, rules and regulations as may be necessary to carry into effect the provisions of this act, not inconsistent with the constitution and laws of this State, and of the United States.

SECTION 2. The capital stock of said company shall be eight hundred thousand dollars, to be devided into shares of fifty dollars each.

28 SECTION 3. The directors named in this act, or a majority of them, may meet at such time and place as they may agree upon, and organize said corporation by the election of one of their body as president; and after such organization, any member of said board shall constitute a quorum for the transaction of business.

SECTION 4. The corporation shall have the power to appoint agents, clerks, treasurers, surveyors, engineers, superintendents, artists, and all other officers and persons, necessary to carry into effect the objects of this act: They shall keep a journal of their proceedings in which shall be entered all the by-laws, rules and regulations, and all orders for the payment of such allowances as may be made to their officers and all other in their employ; and if found to be correct, signed by the president: They may sit on their own adjournments, or on the call of the president; when the president is absent they may appoint a president *pro tempore*. They shall fill all vacancies that may happen in their own body.

SECTION 5. The corporation shall cause books to be opened for subscription to the capital stock, at such time and at such place or places as they may choose, due notice of which shall be given in at least one newspaper published in the town or city where said books are proposed to be opened.

SECTION 6. It shall be lawful for all persons of lawful age, for the agent of any corporate body, for the agent of State, or of the United States, on behalf of the same, to subscribe for any amount of capital stock; and the books shall be kept opened for any such space
29 of time, and at such place or places as the corporation shall choose, and may be reopened at any time and they may, by an agent, offer for sale in any other State any amount of stock upon such terms and conditions as may be thought advisable: They shall have power, on the credit of the corporation, to borrow money on such terms as may be agreed upon by the parties: The corporation may require such sum of money to be paid at the time of subscribing, not exceeding ten dollars on each share, as they may think proper; but such requisition shall be made known by being inserted in the notice for opening the books, and any future payments on the stock shall be under the control of the corporation.

SECTION 7. As soon as fifty thousand dollars are subscribed for and ten (10) dollars are paid on each share, it shall be the duty of the corporation to give three weeks' notice thereof in one or more newspapers and in such notice to appoint a time and place for the stockholders to meet and elect thirteen directors, who shall be stockholders and said election shall be conducted by two judges appointed by the stockholders present; and the persons having a plurality of votes given and counted in public, shall be declared duly elected: No share shall confer a right to vote at any election unless the same shall have been held one month previous to the election; in all election one share shall entitle the holder to one vote; and votes may be given by the person owning the same, or by one of any partners, or by the husband, father, mother, administrator, or executor, trustee or guardian, or by the authorized agent

of any corporation, State, or the United States, or any person having the right to vote, may vote by written proxy.

30 SECTION 8. It shall be the duty of the directors elected as above, and those elected at all subsequent elections, to meet as soon hereafter as they conveniently can, and elect one of their own body president; the president and directors thus elected shall continue in office until the next annual election, and until their successors are elected and qualified or organized:

SECTION 9. All elections after the first shall be held on the first Monday in January, annually, under the direction of three stockholders, not directors at the time, to be appointed by the board at a previous meeting, or by the stockholders present at the time of holding said election, and notice of said election shall be given in at least one newspaper: Provided, that if, from any cause whatever, there should be no election held on the day appointed by this act, or by the directors for the first election, it shall be lawful to hold the elections on any other day.

SECTION 10. Certificates of stock shall be given to the stockholders, which shall be evidence of the stock held, they shall be signed by the president and countersigned by the clerk: The stock shall be transferred on the books of the corporation, personally, or by agent or attorney, or by the administrator, executor, trustee, or gaurdian; but such stock shall be held at all times by the corporation for any dues from the holders thereof to the corporation, or for any sums that may hereafter become due on contract made prior to such transfer.

SECTION 11. The corporation shall have power to call for such portions of the stock subscribed, not exceeding twenty-five dollars on each share in any one year, as they may think proper, to

31 be paid at such time and place as they may designate, by giving sixty day's notice in some newspaper of general circulation where said stock is made payable, or by written notice given to the stockholders, in which shall be specified the amount demanded on each share, and the time and place of payment; if any stockholder shall neglect or refuse to pay any such requisition within ten days after the time named for such payment, the corporation may bring suit against such delinquent for the amount due and called for in any court of competent jurisdiction, and recover the amount due, with ten per centum damages for such detention; and if the amount cannot be made on execution, or if such delinquent is out of the State, then the corporation may, by an order on their books, declare such stock forfeited to the corporation, with whatever amount may have been paid thereon, and no such delinquent, before the forfeiture of the stock, shall have any right to vote for directors or recover any dividend on his, her, or their stock until the corporation is fully satisfied.

SECTION 12. The corporation by their agents, shall have full power from time to time to examine, survey, locate, and construct a railroad, of a single or double track, commencing at some point on the western line of Indiana, and running on the best ground for the

interest of the company and the public convenience, eastwardly through Terre Haute, in the county of Vigo, Greencastle in the county of Putnam, and Indianapolis in the county of Marion to Richmond in the county of Wayne.

SECTION 13. And for the purpose of making such examination and location, it shall be lawful for the corporation, by their agents
32 and persons in their employ, to enter upon any land to make surveys and estimates, and for the purpose of searching for stone, gravel, or wood or other materials necessary for the construction of said road; but no stone, gravel or other material necessary for the construction of said road shall be taken away from any land without the consent of the owner thereof, until the rate of compensation shall be ascertained and paid.

SECTION 14. It shall be lawful for the corporation either before or after the location of any section of the road, to obtain from the person or persons through whose land the same may pass, a relinquishment of so much of the land as may be necessary for the construction or location of said road, as also the stone, gravel, timber, and other materials; and it shall be lawful for said corporation to receive, by donation, gifts, grants, or bequests, land, money, labor, property, stone, gravel, or other materials for the benefit of said corporation, and all such contracts, relinquishments, donations, gifts, grants and bequests made and entered into in writing, by any person or persons capable in law to cont-act, made in consideration of such location, for the benefit of the corporation, shall be binding and obligatory; and the corporation may have their section at law in any court of competent jurisdiction to compel the same: Provided, that all such contracts, relinquishments, donations, gifts, grants, and other bequests, shall be fully and plainly made in writing, signed by the party making the same.

SECTION 15. That in all cases, where any person through whose land the road may run, shall refuse to relinquish the same,
33 or where a contract between the parties cannot be made, it shall be lawful for the corporation to give notice to some justice of — peace in the counties where the difficulties may occur, that such facts do exist, and such justice of the peace shall thereupon summon the owner of such land to appear before him on a particular day within ten days thereafter, and shall appoint twelve disinterested persons of the neighborhood, who shall after taking an oath faithfully and impartially to assess the damages, if any, view the land and materials, and after having taken into consideration the advantages as well as the disadvantages the road may be to the same, and shall report thereon, whether such person is entitled to damages or not, and if so how much, and shall file such return with such justice, whereupon said justice shall enter judgment thereon, unless for good cause where shown; and in case either party should show sufficient cause why judgment should not be entered the justice may grant a review of the premises, either with or without costs: Provided, that either party may, at any stage of the proceedings, appeal to the circuit court of the proper county, as

in other cases, and such court shall appoint reviewers as above directed, who may report at that or succeeding terms, in the discretion of the court, and the judgment of the circuit court shall be final.

SECTION 16. And in all cases where the owner or owners of such land or materials shall be minors, insane persons, or reside out of the country where such lands may be, such justice of the peace shall cause three notices of the application made, and of the day fixed for the appointment of viewers, to be posted up in three of the most public places in the county, and if no person shall
34 attend on the day named in said notice, said justice shall adjourn the same until that day two weeks, at which time he shall proceed as if such person or persons had been duly notified to attend, and on such judgment being rendered, and the corporation complying therein, by the payment of costs or damages awarded against them, the corporation shall be seized of the land or materials: Costs shall be allowed or awarded against either party, at the discretion of the justice.

SECTION 17. That if it should be found necessary and advantageous to the construction of the said road, the corporation shall have the right to lay the same along and upon any State or county road: Provided, however, that before such location shall be made, the corporation shall make application to the county commissioners of the proper county for such right; And the said county commissioners are hereby vested with power to grant the same, by an order entered in their records: and provided also, that such right shall be granted on condition that the corporation shall leave a sufficiency of said State or county road in as good repair for common use, as previous to such occupation.

SECTION 18. That when said corporation shall have procured a right of way as hereinbefore provided, they shall be seized in fee simple of the right to said land, and shall have the sole use and occupation of the same; and no person, body corporate or politic, shall in any way interfere therewith molest, disturb, or injure any of the rights and privileges hereby granted, or that would be calculated to detract from or effect the profits of said corporation.
35 SECTION 19. The corporation shall commence the construction of said road at any time within five years after the opening of the books, and from time to time construct so much towards the point of destination as may be within the ability and to the interest of the company, and shall complete it within fifteen years from its commencement: Provided, that if the road shall not be completed within the time aforesaid, the General Assembly may, for good cause shown, give further time for its construction: Provided also, if any part of said road shall be completed within the time aforesaid, in that case all the rights, privileges, and benefits granted in this act shall be extended to and vested in said company to such part of said road as shall be completed.

SECTION 20. It shall be the duty of said corporation wherever any State or county road, now established, shall cross or may hereafter

cross the railroad, to make and keep in repair good and sufficient causeways so that the free use of said State and county road shall not be obstructed; and in all cases where any person shall own land on both sides of said road, and there shall not be any causeway for a public road leading from one tract to the other, the owner of such lands shall have the right free of charge, to cross the same, and to make such causeways as may be necessary for the convenience of said owner: Provided, that such owner of land shall not injure or obstruct said road.

SECTION 21. That it shall be lawful for said corporation to place or prescribe the kind of carriages that may be used on said road, whether propelled by steam or other power, for the transpor-
36 tation of passengers, for all kinds of products, lumber, goods, wares, and merchandise, or any other kind of property, and for this purpose the corporation may construct said road with such turns, gates, bridges, aqueducts, culverts, toll and ware houses as may be considered necessary for the interest of the company, and the convenience of the public; and the corporation may charge tolls and freights on such part of the road as may be in a sufficient state for travel, although the whole be not finished; and they may charge for travel and transportation on the same, when it is graded and bridged, although the rails may not be laid so as to admit carriages thereon.

SECTION 22. The corporation may charge and receive such tolls and freights for the transportation of persons commodities and carriages on said road, or any part thereof, as shall be for the interest of said company and to charge, lower, or raise at pleasure: Provided, that the rates established from time to time shall be posted in some conspicuous place or places on said road.

SECTION 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum cannot be made;
37 and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount — profit after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

SECTION 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses;

and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper.

SECTION 25. That if any persons or person shall knowingly and willfully injure or obstruct said road, or any part thereof, or break, destroy, or deface any work, edifice, device, toll or ware house belonging thereto, such person or persons so offending shall pay to the corporation five time- the amount of damage actually done, with costs of suits, to be recovered by the corporation before any court having competent jurisdiction: Provided, that all actions commenced by *by* the corporation for the recovery of damages, shall be commenced within six months from the time such cause of action occurred and not after.

SECTION 26. It shall be lawful for the county commissioners for the county through which the road passes, for and on behalf of such county, to authorize, by an order as much of the stock to be taken as they may think proper, at any time within five years from
38 the opening of the books.

SECTION 27. It shall be the duty of the corporation to cause a full statement of the affairs of the company to be made and exhibited to the stockholders at any annual election, or at any general meeting of the stockholders.

SECTION 28. Any number of the stockholders, owning one-third of the stock, may call a general meeting of the stockholders by giving four weeks' notice thereof, in which specifying the object of the call, and a majority of the stockholders being represented, they may make such order, relative to the concerns of the company, as a majority may determine.

SECTION 29. The corporation may by contract, admit the intersection with said road with any other railroad, turnpike, or any other road or collateral road.

SECTION 30. The State, in time of war, shall have the right to transport troops, munitions of war, and provisions, free of toll, on said road.

SECTION 31. Should the capital herein granted not be sufficient to accomplish the intended work, the corporation may increase the same; and the stockholders may, at any time of general meeting, reduce the number of directors to any number not less than five.

SECTION 32. That when the road is located, it shall be the duty of the corporation to cause a plat of the same to be deposited in the office of the Secretary of State, and from and after that time it shall not be lawful for the said corporation to alter or change any part of the said location, unless said corporation pay the owner or
39 owners of lands on such changed route the amount of damages they may sustain by such re-location.

SECTION 33. That if said road, after its completion shall be suffered to go into decay, or be impassable for one year, unless when the same is repairing, this charter shall be taken and considered as forfeited.

SECTION 34. The corporation shall in no case, directly or indirectly,

engage in any kind of trade, or deal in merchandise, other than such as may be necessary to carry into effect the objects contemplated by this act; nor shall said corporation, under any pretence whatever, enter into a banking business, for the purpose of receiving deposits, making discounts, or issuing bills of credit, or bills or receipts of any description, to pass as a circulating medium.

SECTION 35. The corporation shall cause to be kept a fair record of the whole expense of making and repairing said railroad, and of each section thereof, with all the incidental expenses, and also a fair account of the tolls received, and the State shall have the right to purchase the stock of said company, at any time after twenty-five years, by paying to said corporation a sum of money which, together with the tolls received, shall equal the costs and expenses of said railroad as aforesaid, with an interest of ten per centum per annum; and the books of said company shall always be open for the inspection of any agent of the State, appointed for that purpose by the legislature, and upon any refusal to exhibit their books and accounts to said agent, upon request made to the president, all powers granted by this act shall cease.

SECTION 36. The directors of said company that shall contract any debts over and above the amount of good and solvent stock subscribed shall be individually liable for the payment of such excess; and the legislature reserves the right to alter or amend this charter at any time, and to repeal the same, whenever its provisions shall have been violated by said company.

SECTION 37. This act shall take effect and be in force from and after its passage, and shall be deemed and taken to be a public act.

EXHIBIT "B."

THE STATE OF INDIANA, }
Marion County. }

In the Superior Court of Marion County.

THE STATE OF INDIANA *ex Rel.* THE ATTORNEY GENERAL }
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. }

The said plaintiff, The State of Indiana, on the relation of Clarence A. Buskirk, attorney general thereof, complains of said defendant, The Terre Haute and Indianapolis Railroad Company, and says, that in the year 1847, by an act of the General Assembly of the State of Indiana, approved Junuary 26, 1847, entitled "An act to incorporate the Terre Haute and Richmond Railroad Company," Chauncey Rose, and other persons mentioned in said act, and their successors in office, were constituted a body corporate and politic by the name of "The President and Directors of the Terre Haute and Richmond Railroad Company." And afterwards said directors

mentioned in said act, at a meeting duly appointed and held, organized said corporation by the election of one of their body as president. And they accepted and assumed to exercise the corporate franchises vested in them by the aforesaid act, and from that
42 time ever since, said corporation has and does yet exist under the laws of the State of Indiana. But by a subsequent act of the General Assembly of the State of Indiana, approved March 6, 1865, the corporate name of said corporation was changed to the "Terre Haute and Indianapolis Railroad Company," the name now borne by said corporation.

By the terms of the first mentioned act above, under which said corporation was organized and which act was, and is, the charter of said corporation, the defendant was vested with power to locate, construct and operate a railroad of a single or double track, commencing at some point on the western line of the State of Indiana, and running thence eastwardly through Terre Haute in the county of Vigo, Greencastle in the county of Putnam, Indianapolis in the county of Marion, to Richmond in the county of Wayne.

The construction was to be commenced within five years after opening books for subscription to the capital stock of the company, and to be completed within fifteen years after the commencement thereof.

Nevertheless it was provided that if the said company failed to construct the whole line of said road within the time prescribed, "all the rights, privileges and benefits granted" by her charter should be extended to, and vested in said company to such part of said road as might be completed.

The said corporation began and constructed within the time prescribed all of that part of the line of said road between Terre Haute and Indianapolis, which part of said road was constructed and in operation by the first of March, 1852.

43 And no other part of said road was ever made and constructed by said company until after March 6th, 1865, when an act of the General Assembly of the State of Indiana, approved on that day, seven years' further time was given to complete the road to a point on the western line of the State from Terre Haute. And such extention was afterwards made to the State line. And the cost of the extention to the State line was paid out of the earnings of the road, and with money borrowed on the bonds of the company.

Said corporation was given the right to charge and receive such tolls and freights for the transportation of persons, commodities, &c., on said road as might be deemed for the best interests of the company, and to change, lower or raise them at pleasure.

And said corporation was by her charter required by her directors to declare and pay to the stockholders in money, semi-annual dividends of all the net profits of the earnings of the road, less only such portions thereof as the *the* directors at the time of declaring any dividends, might deem it reasonably necessary to retain "as a contingent fund to pay subsequent expenses."

And it was further provided in said charter, in the 23rd section thereof, that when the aggregate amount of dividends declared should amount to the full sum invested and ten per centum per annum thereon, the legislature might or should so regulate the tolls and freights that not more than fifteen per centum per annum should be divided on the capital employed, and that the surplus profits if any, after paying the expenses and reserving such
44 proportion as might be necessary for future contingencies should be paid over to the treasurer of State for the use of common schools.

The plaintiff says that the total cost of said company for the constructing and equiping said road was the sum of $1,300,000, which was all the money of said company at any time invested in said road.

The plaintiff says that the said money invested in the construction of said road was raised by stock subscription by the sale of the stocks of the company, and by issuing and selling bonds of the company. Some of which bonds so issued were afterwards, by the holders thereof, converted into, or exchanged for stocks of the company, and when so converted, they, in the hands of the stockholders, represented a part of the cost of the road to the company, and prior to such conversion they represented a loan to the company, and the interest thereon was paid out of the net earnings of the road. So that allowing the said bonds to be an investment in the road by the company from the time they were converted into stocks, the amount invested by said company in said road at the close of each fiscal year is as shown by Exhibit "A," hereto attached and made a part hereof, and to which reference is made for greater certainty.

And the plaintiff now here alleges and charges that the total amount invested in said road by said company at the close of each year is as shown by said Exhibit "A," and the total investment was, and is, $1,300,000.

The plaintiff further says that the net earnings of said road since said company began to operate any part thereof, is seven mil-
45 lions of dollars, to which must be added fifty thousand dollars for each year invested out of the earnings of the road in permanent improvements, making the total of net earnings of said road received by said company the sum of eight millions of dollars; which said net earnings of the road were received at the times and in the amounts shown by Exhibit "A" hereto attached and a part hereof.

Yet the plaintiff says that the defendant in violation of the 24th section of the charter, did not make semi-annual dividends of all of the profits of her road, as by said 24th section required, but on the contrary thereof, unlawfully withheld from time to time large sums of money out of the net earnings of the road, over and above what was reasonably necessary "as a contingent fund to pay subsequent expenses." And in violation of other provisions of her charter, of the moneys so withheld she invested from time to time in United

States bonds as an investment, and in the bonds and stocks of other railroads, both in and out of the State of Indiana, and in city bonds, and in the purchase of her own stocks from individual holders thereof, the aggregate sum of three millions of dollars; which said investments and purchases of stocks were not made for the purpose of aiding in the construction of lateral roads to the line of the defendant's road, but they were each and all made for the fraudulent and corrupt purpose of withholding so much of the net earnings of the road from the dividends declared from reaching an amount equal to the full sum invested by said company in said road and ten per cent. interest thereon, and of preventing the time being reached when the State might legislate to regulate the tolls
46 and freights of said company, and to defeat the force and operation of the 23rd section of the charter of the company, and to cheat and defraud the State.

And for the same purpose and with the same intent, the defendant, in addition to the money invested as aforesaid, withheld from the net earnings of the road year after year, other large sums of money over and above a reasonable and necessary contingent fund, amounting in the aggregate to two millions of dollars, as a surplus fund. Also for the purpose of preventing legislation to regulate the tolls and freights of the company, and for the purpose of cheating and defrauding the State, the defendant in violation of her charter unlawfully increased her capital stock by converting bonds of the company paid off or purchased with the net earnings of the road in to stocks, to the amount of fifty thousand dollars; and also, by issuing stocks to the amount of five thousand dollars to represent bonds supposed to be lost, and placing said stock in the hands of Chauncey Rose, as trustee for the company, and declared dividends thereon to the credit of the company; and from time to time issued stock dividends to the stockholders, amounting in the aggregate to the sum of $600,000.

And the defendant falsely and fraudulently represented and held out, by her printed reports and otherwise, that the capital stock of the company amounted to two millions and fifteen thousand dollars, and that the defendant had that amount invested in said road; and that the amounts invested by the company in said road in each year, was as shown by Exhibit "C," to which reference is here made as a part hereof.

47 Whereas in truth and in fact the amount invested in said road, by said company was at no time greater than $1,300,000, and as shown by Exhibit "A," and the true amount of the capital stock was only $1,300,000. Said illegal increases of the capital stock, and false presentations as to the amount of the capital stock and as to the aggregate amount invested, and as to the amounts invested at different times in said road, were all and each made for the purpose of cheating the State and of making the amount invested and ten per cent. interest thereon, always appear to be in excess of the earnings net of the road.

And further for the same purpose, the defendant charged up to

the account of the investment of the company, in the road, the whole of the construction account, when in fact, more than half of the construction account was at different times made up of money borrowed upon bonds of the company and used in the construction of the road, and the interest thereon was paid out of the earnings of the road.

And further, for the purpose of keeping the State in ignorance and deceiving as to the true condition of the financial affairs of the company, and for the purpose of all the time making such a showing as that the investment of the company and ten per cent. interest thereon might appear to be less than the net earnings, and that it might at no time, appear that the time mentioned in the 23rd section of the charter, when the State might regulate the tolls and freights, had been reached.

The defendant after having purchased shares of the stock of the company from the individual holders thereof, at a cost of
48 $550,000 instead of retiring said stocks and reducing the amount invested, placed the same in the hands of Chauncey Rose, as trustee for the road, and ever after declared dividends thereon in the hands of said trustee to the credit and for the benefit of the company, and continued falsely to hold out said stocks as representing that amount invested by said company in said road.

The plaintiff charges that the defendant, at all times fraudulently and falsely represented that the investment of the company, and ten per cent. interest thereon was always in excess of the earnings of the road; whereas, the truth is that more than ten years ago the net earnings of the road largely exceeded the investment and ten per cent. interest thereon, and yet exceeds by more than a million and a half of dollars. And all this was done to prevent legislation to regulate the tolls and freights of said company and to cheat and defraud the State. The plaintiff further says that at the sessions of the legislature for the State of Indiana, for 1865, 1867, and 1869, and other sessions, committees were appointed by each house to investigate the affairs of said railroad company, and for other purposes looking to the enforcement of the rights of the State under said 23rd section.

And while these committees had in charge the investigation of financial condition of said company and particularly the question of the rights of the State as connected therewith, the defendant fraudulently and corruptly laid out and expended large sums of money to members of each of said committees, and for the purpose of influencing the action of said committees, and for the pur-
49 pose of preventing reports from being made as to true condition of the affairs of said road, and to prevent any legislative action looking to the regulation of tolls, or to the enforcement of the rights of the State. And in like manner, the defendant at and during the said sessions of the legislature laid out and expended large sums of money to officers of the senate, and to officers of the house of representatives, and to other persons, to hire them to influence members of the senate and of the house of representa-

tives to act for and in the interest of said corporation and against the interest of the State. And in the winter of 1867, while a committee of the senate and also a committee of the house of representatives were at Terre Haute charged with the duties of investigating the affairs of said road, and looking after the interests of the State, the defendant, by her officers and directors, took charge of said committees for the fraudulent and corrupt purpose of influencing them to act in the interest of the corporation and against the State, and prevent investigation into the accounts of said company. And to this end furnished the committees free transportation to and from Terre Haute, paid their bills at Terre Haute, hired carriages and drove them about the city, and furnished them intoxicating drinks and made them drunk and unfit for making an investigation and unfit for any business. And by reason of this conduct, and the use of money as aforesaid, the defendant did prevent investigation and hinder legislative action to enforce the rights of the State.

And the plaintiff further avers that the said defendant here-
50 tofore, to-wit, on the 17th day of January, 1873, by resolution of their board of directors, abandoned and surrendered all her rights and privileges under her original charter and the amendments thereto, and was then and there duly organized under the general railroad laws of this State, passed in 1852.

And the plaintiff further says, that, by reason of the aforesaid conduct of the defendant, and particularly her conduct in not making semi-annual dividends of all the net earnings of the road, as shown above, and as required by her charter, the dividends declared have at no time reached a sum equal to the full investment in said road by the defendant and ten per cent. thereon, though the net earnings of the road are and have been for a long time, greatly in excess of that sum and fifteen per cent. upon the capital employed in operating the road by near two millions of dollars. And by reason of the wrongful conduct of the defendant as above alleged, the time when the State might regulate the tolls and the freights, has never been reached. And by reason of the fraudulent and corrupt action of the defendant, and her false and fraudulent representations as to the amount invested by her in said road as above alleged and shown. And by the other act of the defendant, above alleged, she has kept concealed the just and true condition of her financial affairs as between her and the State. All in violation of the trust reposed in said corporation by the grant of her charter. And the plaintiff says that the defendant has at no time, paid over and accounted to the State for any part of the net earnings of said road; and that there is due and owing to the State on a fair
51 accounting, the sum of fifteen hundred thousand dollars, for which sum the State prays judgment for the use of common schools.

Second. And further complaining of said defendant, the plaintiff says, that on the — day of January, 1847, the General Assembly of the State of Indiana, passed an act, which was approved on the 26th day of January, 1847, entitled "An act to incorporate the Terre Haute

& Richmond Railroad Company." That Chauncey Rose, Samuel Crawford, E. M. Huntington, James Farrington, Thomas J. Bourne and R. W. Thompson, of the county of Vigo and State of Indiana, and their successors in office, were constituted a body corporate and politic, by the name of the "President and Directors of the Terre Haute and Richmond Railroad Company." And afterwards the said directors, at a meeting duly appointed and held, organized said corporation by the election of one of their body president and they then and there accepted and assumed the exercise of the corporate franchises vested in them by the aforesaid act.

By the 12th section of said act (which said act, with the amendments thereto, constituted the charter of said corporation) the said corporation was granted the privilege, right and power to locate and construct a railroad of a single or double track, commencing at some point on the western line of the State of Indiana, and running on the best ground for the interest of the company and the public, through Terre Haute, in the county of Vigo, Greencastle in the county of Putnam, and Indianapolis in the county of Marion, to Richmond, in the county of Wayne. And said corporation
52 was by other parts of said act granted such other powers, rights and privileges as were incidental and necessary to the exercise of the rights granted in said 12th section, and to the operation of said road when constructed. These rights and privileges were granted her on the implied condition that she would faithfully keep and perform the terms of her charter.

And the plaintiff says that the said company, in pursuance of the act of the General Assembly of the State of Indiana, entitled "An act to change the name of the Terre Haute and Richmond Railroad Company, and to give further time for the completion of the line of said road from Terre Haute to a point on the western line of the State of Indiana," approved March 6th, 1865, changed her name from that of the "President and Directors of the Terre Haute and Richmond Railroad Company," to that of the name of the present defendant, and that she has ever since been, and is now known by the name last aforesaid, to-wit: "The Terre Haute and Indianapolis Railroad Company." That the said defendant in its several names was governed and was bound by all the provisions of its original charter and the amendments thereto, subsequently enacted.

That the said defendant, in violation of the provisions of its said charter, and for the purpose of defrauding the State of Indiana, and the common school fund of said State, and to prevent the declaration of dividends, as provided for by the 23rd and 24th sections of her said charter, failed to use and appropriate the net profits of said company, as required by her charter, but in violation thereof, used and appropriated large sums of money out of the said net earnings as follows:

53 In the year 1854, the said defendant, by the action of her board of directors, subscribed for, and became the holder of the stocks of the Evansville and Crawfordsville Railroad Company to the amount of $24,429.89.

In the year 1860, the said defendant invested in said last named company, the further sum of $105,000.00.

In April 1862, the said defendant invested the further sum of $50,000.00 in the Cincinnati and Indianapolis Railroad Company.

In March 1862, defendant invested in the bonds of the St. Louis, Alton and Terre Haute Railroad Company the sum of $85,696.00.

During the year 1868 the said defendant advanced to the St. Louis, Vandalia and Terre Haute Railroad Company the sum of $191,258.47.

That during the same year the said defendant invested in the bonds of the Nashville and Henderson Railroad Company, the sum of *$42,500.00*.

That during the year 1869, the defendant invested in the stock of the St. Louis, Vandalia and Terre Haute Railroad Company, the further sum of $265,000.00.

That said defendant in the years 1868, 1869, and 1870, purchased the bonds of said last named company, and invested therein the sum of $460,400.00.

That in the year 1870 the said defendant invested in the stock of the Terre Haute and Chicago Railroad Company, the sum of $50,000.00.

And the plaintiff further charges and avers that said defendant has since the year of 1870, and prior to the 17th day — January, 1873, invested of the net earnings of said company other large sums of money in other companies, corporations and enterprises.

54 The particular amounts invested in each, and the names of the companies, corporations and enterprises are to the plaintiff unknown; but she avers that each and all of said sums of money, so invested, as last aforesaid, was a part of the net earnings of the company, and amounting in the aggregate to three millions of dollars.

And the plaintiff further says that heretofore, to-wit: on the — day of ——, 1868, the said defendant paid out of the net earnings of the company, $50,000.00 of the bonds of the company, that had been before that time issued by the company, and then and there issued and delivered to Chauncey Rose, as trustee for the company, certificates of stock to the amount of $50,000.00, and which stock has ever since been held by said Rose as such trustee.

And that afterwards, to-wit: on the — day of —— 18— there was outstanding of the bonds of said company the sum of five thousand dollars, which has never been paid. That on the day last aforesaid, the said company issued stock certificates to the amount of five thousand dollars to said Chauncey Rose, as such trustee; and that on the — day of —— 1867, the said defendant out of the net earnings of said company, purchased 5872 shares of fifty dollars each, of the stock of said company, then in the hands of the stockholders of said company, and paid the sum of 1.81 to the dollar thereof amounting in all to $531,416.00 and then and there had the same transferred to said Chauncey Rose, as trustee of said company.

And the plaintiff avers that all of said stock has ever since been, and is now held by said Rose as such trustee.

55 And said company has each year in June and December declared and paid dividends on said stock, and at all elections for directors and for other purposes, the said Rose as such holder of said stock, has voted the same.

And the plaintiff further says that heretofore, to wit: on the — day of ——, 1856, a stock dividend of twenty per cent. was issued by said company, and certificates therefor were issued to the several stockholders of said company, amounting in all to $211,600.

And that afterwards, to wit: on the — day of ——, 1864, the said company made out and delivered to the several stockholders of said company, a further stock dividend on their stock of twenty-five per cent. That in neither case was one cent paid by said stockholders to or for the use of the company.

That said stock dividends last aforesaid amounted to the sum of $376,700.00. That each of said stock dividends were made and the stock issued and delivered to the stockholders for the purpose of increasing the basis upon which to declare dividends, and for the purpose of diminishing the rate per cent. of the dividends upon the stock of the company.

That the total amount of valid legal stock of said company has been ever since 1867, and is now, $1,344,000.00. That the defendant claimed, pretended and represented in her published reports, that she had paid dividends to persons claiming to be, and who the defendant falsely and fraudulently represented were, actual, *bona fide* stockholders in the stock of said company to the amount of

56 $1,988,150 when in truth and in fact they should have been dividends only one $1,344,000. And the plaintiff further avers that said defendant has for the last ten years retained out of the net earnings of said company and withheld the same from the stockholders each year $100,000.00 more than was necessary for the contingent fund to meet subsequent expenses no part of which has ever been accounted for.

And the plaintiff further avers that, at and during the session of the General Assembly of this State for the year 1869, the affairs and condition of said corporation generally, and particularly the interest of the State as effected and involved in the 23rd section of said charter was before, and being considered by the house of representatives of said General Assembly; and the said house of representatives of said General Assembly appointed a committee, consisting of five members of said house to investigate said matters and report the same back to said house for its action. That said committee entered upon the discharge of its duties in that regard, and upon said investigation in pursuance of said appointment, and while said committee were so engaged in the discharge of their duty in making such investigation, said defendant corruptly and unlawfully offered and gave to said members of said committee, and to each of them, the sum of $2,500.00 for the purpose of corruptly and unlawfully influencing their action as members of said committee, and of said

house; and for the further corrupt purpose of preventing said investigation, and of preventing them from making a report of said investigation to said house prejudicial to the interest of said defendant; and for the further corrupt purpose of having
57 them to suppose the facts by then ascertained and made as such committee; and for the further corrupt purpose of preventing action and legislation by said General Assembly supposed to be prejudicial to the interest of the schemes of said corporation; and for the further corrupt purpose of preventing said assembly from performing any legislative action looking to the enforcement and carrying out the provisions and reservations of the said 23rd section of the charter of said corporation. And further and more particularly plaintiff cannot state the character of the arrangement and agreement between said corporation and the said members of said committee; nor more fully how said committee were to do and act, further than that they and each of them were to act in the interest of said corporation, as the hirelings thereof, and against the interest of the State and the common school fund of the State. And the plaintiff says that the said corrupt means so, as aforesaid, resorted to, by said defendant, did, then and there, prevent the said house from taking any action in the premises calculated to, or which could benefit the plaintiff, or which could operate in such way as to disclose the true condition of said company, or the amount of profits that had been realized by said defendant.

And the plaintiff avers that each and every of the several acts hereinbefore complained of, are and were done for the purpose of preventing the contingency arising in which the State could interpose to regulate the tolls and freights of said company; and that by the acts and doings of the defendant in the premises, she, the said defendant, did prevent the State from knowing that the
58 profits realized exceeded the cost of said railroad to the stockholders, and ten per cent. per annum thereon; and thereby did prevent the State from obtaining the knowledge and information which was necessary to place her in a condition — which she could interpose to regulate said tolls and freights; and that but for said fraudulent acts of said company, the State would have interfered and regulated the tolls and freights of said company, as she was authorized to do by the terms and provisions of said charter; and that each and all of said acts were done for the purpose of defrauding the State of Indiana and the common school fund of the State;

Wherefore, the plaintiff says that the defendant is indebted to her in the sum of one million five hundred thousand dollars, for which sum she asks judgment.

Third. The said plaintiff further complaining of said defendant, says, that the said company was organized and now exists as a corporation under and by virtue of the several acts referred to in the first paragraph of this complaint.

That the said defendant is indebted to the State of Indiana in the sum of one hundred thousand dollars for money illegally demanded

collected and received by said company in the transportation of troops and munitions of war for said State during the late war, to-wit: during the years 1861, 1862, 1863, 1864, 1865 and 1866.

That by reason thereof there is now due the State from said defendant the said sum of one hundred thousand dollars, for which sum she demands judgment.

59 C. A. BUSKIRK, *Attorney General*,
HARRISON, CLAYPOOL & DENNY,
Attorneys for Plaintiff.

60 EXHIBIT "A."

The following statement shows the amount invested in said road at the close of each year.

1849	$102,911.19
1850	231,167.67
1851	362,262.85
1852	632,387.10
1853	738,650.00
1854	924,100.00
1855	974,800.00
1856	1,082,850.00
1857	1,144,850.00
1858	1,164,850.00
1859	1,164,850.00
1860	1,169,850.00
1861	1,169,850.00
1862	1,228,850.00
1863	1,305,850.00
1864	1,311,850.00
1865	1,339,850.00
1866	1,344,850.00
1866	1,344,850.00
1867	1,344,850.00
1868	1,344,850.00
1869	1,344,850.00
1870	1,344,850.00
1871	1,344,850.00
1872	1,344,850.00
61 1873	1,344,850.00
1874	1,344,850.00

62 EXHIBIT "B."

The following shows the net earnings received by the said company for each successive year.

1852	$171,446.05
1853	211,644.60
1854	259,323.39
1855	289,702.76
1856	471,496.98
1857	306,078.67
1858	286,823.75
1859	282,154.86
1860	317,381.55
1861	316,183.95
1862	461,272.66
1863	545,274.43
1864	621,254.40
1865	698,670.79
1866	431,101.10
1867	501,706.71
1868	604,418.89
1869	443,221.36
1870	550,465.05
1871	410,933.11
1872	443,267.81
1873	443,367.81
1874	443,267.81
1875	443,267.81

63 EXHIBIT "C."

The following statement shows the amount which the defendant falsely claimed and represented she had invested at the close of each year.

1852	$632,387.00
1853	738,650.00
1854	924,100.00
1855	974,800.00
1856	1,082,850.00
1857	1,376,450.00
1858	1,381,450.00
1859	1,381,450.00
1860	1,381,450.00
1861	1,440,450.00
1862	1,517,450.00
1863	1,900,150.00

1864	1,928,150.00
1865	1,928,150.00
1866	1,983,150.00
1867	1,988,150.00
1868	1,988,150.00
1869	1,988,150.00
1870	1,988,150.00
1871	1,988,150.00
1872	1,990,000.00
1873	1,990,000.00
1874	1,996,000.00
1875	1,996,000.00

64 Exhibit "C."

And afterwards, to-wit: on the 18th day of June, 1875, that being the 11th judicial day of the June term, 1875, of said court, before the Hon. Samual E. Perkins, judge, the following proceeding was had in this cause, viz:

The defendant comes by counsel and files a demurrer to plaintiff's complaint in the words and figures following, to-wit:

STATE OF INDIANA, }
Marion County. }

In the Superior Court of said County.

THE STATE OF INDIANA on the Relation of the ATTORNEY General
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

The defendant in the above entitled cause comes and demurs separately to each paragraph of the complaint of said plaintiff, and for cause of demurrer shows:

First. That neither of said paragraphs states facts sufficient to constitute a good cause of action.

R. W. THOMPSON,
BARD & BRUFT,
65 HARRISON, HINES & MILLER,
Attorneys for Defendant.

66 EXHIBIT "D."

"The plaintiff failing and refusing to amend the complaint herein and electing to stand by said complaint,

It is considered and adjudged by the court that the plaintiff take nothing by said complaint, and that said defendant go hence thereof."

67 And afterwards, to-wit: on the 22nd day of April, 1897, there was issued from the office of the clerk of said Marion county superior court, a writ of summons in this cause, directed to the sheriff of Vigo county, Indiana. And afterwards, to-wit: in due time the said sheriff returned said writ of summons to the office of the clerk aforesaid, with his doings therein endorsed thereon.

Said writ, with said sheriff'- return thereon endorsed is in the words and figures following, that is to say:

STATE OF INDIANA, } *sct:*
Marion County, }

The State of Indiana to the sheriff of Vigo county, Greeting:

You are hereby commanded to summon The Terre Haute & Indianapolis Railroad Company and Volney T. Malott, receiver thereof to appear before the judges of the superior court of Marion county, Indiana, on the third day of May, 1897, being the first judicial day of the May term, 1897, of said court, which term commence- at the court house in the city of Indianapolis, on the first Monday in said month and year last above named, then and there to answer the complaint of The State of Indiana, *ex rel.*,
68 & 69 William A. Ketcham, attorney general and have you then and there this writ.

In testimony whereof, I hereunto subscribe my name, and affix the seal of said superior court, at my office, in the city of Indianapolis the 22nd day of April, 1897.

[SEAL.]

JAMES W. FESLER,
Clerk Superior Court, Marion County.

"Came to hand April 23rd, 1897, I served this summons by reading to and within the hearing of George E. Farrington and Robert E. Thompson, the secretary and treasurer of the defendant company, Terre Haute & Indianapolis Railroad Company; also left a true and certified copy of this summons in the hands of George E. Farrington, the secretary of said Terre Haute and Indianapolis Railroad Company, this 23rd day of April, 1897.

LOUIS P. SEEBURGER,
Sheriff of Vigo County."

70 And after the filing of said complaint and the issuing of said summons, to-wit: on the said 22nd day of April, 1897, being the — judicial day of the general term of said Marion superior court for the month aforesaid, before the Hon. John L. McMaster, Lawson M. Harvey and Vinson Carter the judges thereof, the following proceeding was had herein, viz:

"Ordered, that cause number 54,555, be assigned to room three (3) for trial."

And afterwards to-wit: on the 5th day of May, 1897, being the third judicial day of the special term of said Marion superior court for the month aforesaid, before the Hon. Vinson Carter, judge presiding in said room three (3), the following proceeding was had herein:

"On plaintiff's motion the defendants are ruled to answer the complaint herein."

And afterwards, to-wit: on the 8th day of May 1897, being the 6th judicial day of the May term 1897, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Comes the defendant, Terre Haute and Indianapolis Railroad Company by counsel, and files a demurrer to the complaint herein, as follows, viz.

71 STATE OF INDIANA, }
Marion County. }

Superior Court, May Term, 1897.

STATE OF INDIANA *ex Rel.* WILLIAM A. Ketcham, Attorney General, *vs.* THE TERRE HAUTE AND INDIANAPOLIS Railroad Company.	Number 54555. Room 3. Demurrer to the Complaint.

The Terre Haute and Indianapolis Railroad Company, defendant in this cause, demurs to the complaint herein, for the reason that said complaint does not state facts sufficient to constitute a cause of action against this defendant; and in support of this demurrer defendant shows to the court, as one of the many imperfections of said complaint, that it seeks to take from this defendant, property in which it has vested rights by virtue of its original charter and the amendments thereof, and by virtue of the judgment of this honorable court in the complaint set forth; and to accomplish this result, invokes the aid of laws enacted by the General Assembly of the State of Indiana, at its regular session in 1899, which said laws and all the acts and doings of the plaintiff in attempting to deprive the defendant of its property and to invalidate said judgment, are in violation of section 10 of article 1, of the Constitution of the United States, and of article 5, and of section 1, of article 14 of the
72 amendments to said Constitution.

LAWRENCE MAXWELL, JR.,
CHAMBERS, PICKENS & MOORES,
Attorneys for Defendant.

JOHN G. WILLIAMS, *Of Counsel.*"

And afterwards to wit: on the 19th day of June 1897, being the 12th judicial day of the June term 1897, of said court, before the

same Hon. Vinson Carter, John L. McMaster and Lawson M. Harvey judges ther-of, the following proceedings were had herein, viz:

"Comes the parties by counsel, and the court having examined the demurrer of the defendant to the complaint herein, and having heard argument thereon, and being fully advised in the premises, overrules said demurrer, to which ruling of the court the defendant, at the time accepts, and is ruled by the court to answer over.

And the opinion read in ruling on said demurrer is now by order of the court made part of the record herein, it being as follows, viz:

73 STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court.

STATE OF INDIANA on the Relation of W. A. Ketcham, Attorney General,
vs.
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

Action by the State on the relation of the Attorney General against the defendant, T. H. & I. R. R. Co., for an accounting as to certain profits earned by the defendant and to recover whatever portion thereof might be found due to the State under the provisions of the defendant's charter.

The defendant demurs to the complaint for insufficiency of facts.

A number of questions are thus presented, and have been discussed by counsel in briefs and by oral argument.

1. It is contended on the part of the State that the provisions of section 23 of the defendant's charter constitute a limitation on the amount of profits which the defendant was entitled to retain out of the earnings of the road to be constructed under the provisions of the charter. That the company could retain the following sums, but no more:

74 1st. A sum sufficient to pay to the stockholders the amount of principal invested by them in the construction of the road.

2nd. A sum sufficient to pay to the said stockholders ten per — annum on the principal of said capital invested.

3rd. After payment of both of the above sums, to pay thereafter a dividend on the amount of such capital, of fifteen per cent. per annum.

4th. A reasonable sum to meet future contingencies.

The surplus, if any remaining, to be paid to the State for the benefit of the common school fund.

On the part of the defendant it is contended that the payment of the sums mentioned in items 1, 2, 3, and 4 simply operated to ripen the right of the General Assembly to regulate the tolls and freights thereafter,

That the right of the State to the surplus profits would not accrue until after the General Assembly had regulated the tolls and freights, and then only as to such surplus profits as might accrue after such regulation, and that no such regulation having been ever made by the General Assembly that the right of the State to surplus profits never attached. And further that the company having surrendered its charter in 1873, there never was and never can be any profits to which the State may lay claim.

Sections 22, 23 and 24 must be construed together, and in natural order, section 24 should precede 23.

The charter is a contract between the State and the defendant and must be construed as are contracts between individuals,
75 except that in cases of ambiguity it must be construed more strongly against the railroad corporation, it being a well established principle that a corporation created by special charter possesses only such rights as are clearly and distinctly granted. If there be a doubt as to a power or right, the doubt must be solved against the corporation.

Counsel assert both in argument and in brief with apparent confidence, that the State's right to surplus profits could only accrue after the legislature had exercised its right to regulate tolls and freight. The confidence with which this position is assumed has caused us to give special consideration thereto.

We have also read the opinion given in the former case in this court.

No authority is cited in the former opinion or in the briefs of counsel and we are remitted for our conclusion to the language of the act itself.

The contention that the right of the State to surplus profits is dependent upon the exercise by the State of its right to regulate tolls, it seems to us is not well founded in reason, and is the result of a mistaken theory as to the relations of the parties. It is now a settled principle of law that the legislature has the power, whether reserved in the charter or not, to regulate the tolls, freights and fares to be charged by a common carrier. This power is not acquired by some concession of the corporation but is originally inherent in the State.

This principle has in the recent case of Navin *vs.* The State (the Three Cent Fare case) been reasserted and declared by our own supreme court.

76 The words of the charter to-wit: "May so regulate the tolls and freights" it must be conceded imply the granting of a right, and if the controversy were between two individuals as to rights acquired under a contract, there would be reason for contending that the concession of a right on one side was conditioned upon performance of obligation upon the other, but this charter must receive a construction in the light of the peculiar relations and conditions surrounding the parties at and prior to the time it was granted; what were they?

We have on the one side the State with plenary powers to regu-

late fares of common carriers, limited only to the extent that such regulation may not amount to confiscation.

On the other hand we have the corporation, a creature of the State, and dependent upon the State for its right to exist. The corporation could acquire only such rights as the State was pleased to grant. The potter hath power over the clay to make the vessel either unto honor or dishonor. It is illogical and inconsistent under such circumstances to say that the State first surrendered or transferred to the corporation its sovereign right to regulate tolls, and then received back from the corporation a limited portion of such right.

This is not what was done. The words of the charter above quoted were not intended and cannot be construed as an enlargement of the rights of the State over what they had previously been, but whatever the form of the words in the charter may be, they must be construed as a restriction or limitation upon the rights of the State as they previously existed, and not a right granted by the corporation.

77 If we are right in this conclusion, then it follows that the agreement on the part of the State, in consideration of which it was to receive surplus profits, was not that it *would* regulate tolls and freights, but that it would *refrain* from regulating them.

No benefit could accrue to the corporation from the State's regulation of tolls. Such regulation is the very thing the corporation did not want.

Will it be said that when the corporation had the right to charge tolls at its pleasure, without limit, that the taking from it by the State of the right to charge over a fixed sum was of such value and benefit to the corporation that it would be willing to pay therefor a sum equal to all of the profits of its business over fifteen per cent. on the capital invested.

By the act of 1847 the State agreed with the defendant that it would surrender its right to regulate tolls altogether until the stockholders should receive back from earnings the capital invested with ten per cent. per annum thereon, and after that time to surrender its — regulate said tolls to any lower rate than would leave sufficient earnings to make a dividend of fifteen per cent. per annum upon the amount of capital invested, and in consideration of this surrender of right, to regulate tolls on the part of the State, the defendant agreed that as soon as the stockholders had received their capital with interest, that all the surplus earnings after paying a fifteen per cent. dividend and reserving a reasonable sum for contingencies, should be paid over to the State. That this is the true relation

78 assumed by the parties by the terms of the charter we *we* think cannot be successfully controverted, and viewed from this standpoint it becomes perfectly clear that the State's right to surplus profits does not depend upon the taking of affirmative action by the State to regular tolls, but rather in consideration that the State will not take such action, or at least not below certain limits.

The corporation has not granted to the State a right to regulate the tolls because it possessed so such right to grant.

Such right already belonging to the State.

Instead of the State being a recipient of a grant of power from its creature, the corporation it is in the attitude of having for a consideration surrendered to the corporation a portion of its sovereign power and right. We therefore think that the true construction of section 23 is that the State's right to surplus profits over the fifteen per cent. accrued as soon as the stockholders had received from earnings their capital with ten per cent. per annum thereon, whenever that might be, and that from and after that date all surplus profits over said fifteen per cent. and a reserve fund, belonging to the State, and must be accounted for to it; and this without any regard as to whether the State had assumed to regulate tolls or not.

It is also contended that the State's right to share in the profits would not accrue until dividends were actually declared sufficient to return to the stockholders their capital invested and ten per cent. per annum thereon, and that as the bill shows that the requi-

79 site amount of dividends has not been declared *sufficient to return to the stockholders their capital invested and ten per cent. per annum thereon, and that as the bill shows that the requisite amount of dividends has not been declared*, therefore the State's right has not ripened. If the bill contained no other allegation than that the requisite amount of dividends had not been declared, then the State would have no cause of action. But where it is shown as it is in this bill that the earnings have been sufficient to pay back the capital invested, the ten per cent. per annum, the fifteen per cent. dividend, and still leave a surplus of $2,000,000 we think a right is shown in the State to demand that said dividends be declared, or be treated as declared, and that the State be admitted to the rights in the surplus profits.

Section 24 requires that dividends shall be declared semi-annually out of the profits, also that the expenses shall be paid, and a reasonable contingent fund reserved out of the same fund. The only other use directed to be made of the profits is the payment of dividends, and when we take into consideration the manifest intention of the legislature that as soon as the stockholders shall have received a return of the capital invested by them and ten per cent. thereon, that the State should have an interest in the profits, we think there is cast upon the company the duty of applying the entire profits over expenses and a contingent reserve in payment of dividends to stockholders until they have received their capital and ten per cent. per annum thereon.

The company is given a very large discretion as to the amount of the contingent reserve and the dividends to stockholders

80 until they are made whole for the capital invested; there could be no abuse of this discretion so far as the largeness of the dividends *are* concerned, for the larger the dividends the sooner the stockholder's capital would be returned to him. But as to the

contingent reserve, the amount reserved might be so unreasonably large as to amount to an abuse of such discretion and for which a court of equity would interfere.

The fact that the company had wilfully refused to apply the earnings on dividends, although ample, had made large investments to avoid doing so, and had fraudulently concealed from the State the amount of the earnings, all with the purpose of preventing the State from demanding its rights in the surplus earnings, could not in any way affect the State's rights in the matter.

The company could not hide behind its own fraud, or thereby in any way change or lessen its obligations to the State.

3. It is also contended that when the legislature in 1851 released the defendant from its obligations to build that part of the road between the city of Indianapolis and the city of Richmond, and granted the franchise to a new corporation, that this was such a change in the contract as would operate to release the defendant from its obligation to account for surplus profits to the State, and the case of Covington Turnpike Co. *vs.* Sandford 164 U. S. 578 is cited as an authority in support of this proposition.

Upon a reading of the opinion in that case it will appear that the facts there are in many particulars different from the facts in the case at bar.

81 In the Turnpike Co. case the legislature created two new and entirely distinct corporations. The stockholders of the old becoming stockholders in one or the other of the new corporations, the old corporation consenting thereto and going out of existence. While in the case at bar, the old company continued in existence and in possession of all its rights and privileges with the bare exception that it surrendered its right and was released from its obligation to build that portion of the road between Indianapolis and Richmond.

The release from its obligation to construct that portion of the road would be a good consideration for its surrender of its right to own and operate such portion of its original line.

It further appears from the act of 1851 that the defendant consented to the change made in its charter by said act.

It then comes to this, that the parties to a contract have mutually agreed to cancel or modify a certain portion thereof, but providing in their contract of modification that the contract as to all other provisions shall remain in force.

We know of no principle or authority, and none has been brought to our attention, by which a modification of a contract by the mutual consent of the parties thereto, shall operate to wholly annul the other provisions of the contract.

Just why the cancellation of that portion of the charter contract as relates to the line between Indianapolis and Richmond makes it utterly impossible for the defendant to account for and pay over surplus earnings to the school fund, we are unable to see.

82 How it can make any possible difference to the stockholder as to whether his capital is restored to him out of the earn-

ings of the road west of Indianapolis or out of the whole line is not apparent, when it must be considered that if the eastern end of the road be built, that there must be added to the amount of capital to be returned, the full amount of the cost of that portion of the road, and that the stockholders' profits are limited within a fixed sum.

But however this may be, the fact that the change in the line of road to be built was made by the mutual consent of both parties is a complete answer to the claim asserted, and especially when by the original terms of the charter it is provided that in case the entire line of roads shall not be built, then all the rights, privileges and benefits shall be extended to such part of said road as shall be completed.

4. The fact that in 1873 the defendant accepted the provisions of the general law and surrendered its charter, had only the effect of releasing the defendant's right to operate under the special charter thereafter, but it in no way effected the defendant's obligations to the State or other parties, previously incurred, and as to all such objects said charter would remain in full force until such obligations were discharged.

5. The allegations contained in the bill of efforts to corrupt legislators and committees amount to nothing more than a charge of concealment of the facts from the State.

6. In construing the provisions of the defendant's charter, so far we have given no consideration to the legislation enacted in
83 1897, for the reason that in so far as it attempts, if it does so attempt, to add or to change the liabilities or obligations of the defendant, whether by express provision, interpretation, or retroactive operation, it is in violation of the Constitution, and therefore invalid.

In so far, however, as such legislation provides a remedy for enforcing an existing obligation, or confers upon any officer authority to do any act or thing in the furtherance of existing rights, it is valid and binding.

7. The next question in the case is the one growing out of the former suit in this court.

It is claimed by the State that the judgment in said cause is void, for the reason that the attorney general, who as relator instituted the suit, had no authority to do so, and that having no authority, the court acquired no jurisdiction over the State so as to make the judgment binding on the State.

The contention is that the attorney general had no authority of his own motion to move in the matter but that he must first be required to appear either by notice from the clerk of the court in which the suit was pending or by authority in writing from the governor or from a majority of the State officers and that in no other way could he acquire authority to represent the State in such suit.

To this contention we do not assent.

Section 5668 R. S. 1881, provides that it shall be the duty of the attorney general to cause suit to be instituted to recover money due

from any source where the same is required by law to be paid to the State or any officer in trust for the State.

84 Under this section it has been held that the attorney general was the proper relator to sue for money due to the common school fund.

Board *vs.* The State 92 Ind. 353.

There are numerous other cases in our State reports where the attorney general has appeared as relator in suits to recover money due to the school fund, while true, in these other cases the question was not raised as to the right of the attorney general to appear as relator, yet they are examples as to what has long been the practice in this State.

Our conclusion therefore on this point, is that the attorney general had authority to appear as relator in such suit.

A second reason which is relied on by the State, is that before a suit could be maintained by the State it must have made a demand upon the corporation.

That the complaint in the former case contained no allegation that a demand had been made before suit brought. That the suit therefore was premature, and that the demurrer was correctly sustained for that reason and that the judgment on demurrer on that suit is no bar to a subsequent suit brought after demand made.

It is well settled that in case of an ordinary debt it is the duty of the debtor to hunt up his creditor and pay or tender the amount of his obligation if he would avoid being sued, and in all such cases no previous demand is necessary, before commencement of suit.

85 There are, however, many exceptions to this rule, collecting agents and attorneys, trustees and persons who come lawfully into the possession of funds in trust for others, as a general rule cannot be sued without a demand first made and a complaint which does not show such a demand is bad on demurrer.

Deposits in banks are payable only on demand.

There are many authorities holding that dividends declared upon the stock of a corporation cannot be collected by suit, by the stockholders until after demand made and payment refused.

The surplus profits which the corporation was to pay the State was necessary for an unascertained amount.

It was necessary that the corporation should declare certain dividends to stockholders and fix the amount of the contingent reserve fund before it could be known how much was due the State, and in case of the corporation's failure or neglect to perform that duty it is but reasonable that before commencing a suit the State should make a demand upon the corporation to act.

The surplus profits due the State are much akin to dividends declared. In fact it may be said that such profits are an appropriation or dividend declared in advance, and we can see no reason that prevents a stockholder from suing for dividends declared until after demand made that does not apply with equal force to the demand of the State for its share in the profits.

The payment of dividends on stock in a corporation is simply a division of net profits and when by the law the corporation is required to make a dividend of a certain per cent. on the stock
86 and the residue to go to the State, the State's portion becomes just as truly a dividend as does the portion to be paid to the stockholder.

We therefore conclude that a demand by the State on the corporation was a condition precedent to the maintenance of the former suit.

It is further contended by the defendant that although a demand may be necessary that such demand may be waived and that when it is shown that the defendant has converted the fund sued for to its own use or in case a demand would be unavailing, then no demand is necessary and it is claimed that in the former suit the complaint showed a conversion by the defendant and that for that reason a sufficient excuse was shown for not making a demand.

This requires us to decide whether the allegations in the complaint in the former case show that the defendant had converted the surplus profits to its own use.

If such conversion was charged then it was unnecessary to allege a demand.

There is no allegation in the complaint expressly charging a conversion.

The allegations are that the defendant failed to declare dividends which ought to have been declared to the stockholders and that instead of applying said sums to said dividends it had invested the same in stocks and bonds and held a large sum, to-wit: $2,000,000 as a surplus fund, and that this system of holding the funds was resorted to, not for the purpose of appropriating the State's share of the profits to its own use, but of concealing from the State the
87 fact that the time had arrived when the State could exercise its reserved right to regulate the tolls and freights.

It is nowhere alleged that the amount due the State had been ascertained and set apart and thereafter used for other purposes, nor had it averred that the funds used in the purchase of stocks and bonds was from the surplus profits which belonged to the State, but rather that said stocks and bonds were purchased out of moneys that the company could have used in payment of dividends to stockholders.

It is charged that the amount due the State was $1,500,000 but it is also shown that the company held as a surplus the sum of $2,000,000.

These allegations in our opinion amount to nothing more than that, having received earnings sufficient to pay the stockholders their capital and ten per cent. — annum thereon, a fifteen per cent. per annum dividend thereafter, and after reserving a reasonable contingent fund, and still leave a surplus of $2,000,000, the company had failed and neglected to pay over to the State its portion thereof.

This we do not think amounts to a charge of conversion of the State's portion of the surplus profits so as to excuse the State from

making a demand before bringing suit, but rather, it would appear that the company then held a fund as a surplus which was more than sufficient to pay the State's portion of profits.

We do not think it can be claimed, while the company still has a fund derived from the earnings more than sufficient to discharge the State's claim, that it has converted the State's share of the profits to its own use.

88 The mere holding of a fund is not a conversion of it.

We are therefore of the opinion that the demurrer to the complaint should be overruled, and it is so ordered.

89 And afterwards to-wit: on the 30th day of June 1897, being the 21st judicial day of the June term 1897 of said court, before the Hon. Vinson Carter, judge, the following proceeding was had herein, viz:

"Comes the defendant by counsel, and files its answer in four (4) paragraphs to the complaint herein and the plaintiff is ruled by the court to reply to the same.

Said answer is in the words and figures following, viz:

90 STATE OF INDIANA, } *ss:*
County of Marion, }

Superior Court, Room # 3.

THE STATE OF INDIANA *ex Rel.* W. A. KETCHAM, Attorney General,
vs.
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

Comes now the Terre Haute & Indianapolis Railroad Company, defendant in the above entitled cause, and for answer to the complaint herein says:

Paragraph I. That it denies each and every allegation in the complaint contained.

Paragraph II. Defendant further answering says that after it became incorporated under the act of the General Assembly of the State of Indiana, approved January 26th 1847, and before any part of the railroad authorized by that act had been completed or put in operation, this defendant solicited the passage of an act by said General Assembly, amending its original charter of 1847, and thereupon said General Assembly passed an act entitled "An act to amend the act entitled An act to incorporate the Terre Haute & Richmond Railroad Company, approved January 26th 1847, and the several acts amendatory of said act." Approved January 20th 1851. And this last named act was immediately upon its passage and approval, accepted and adopted by defendant; that pursuant to the terms of said act of 1851, the railroad of defendant was

91 terminated at Indianapolis, Indiana, instead of Richmond, Indiana, and has so remained ever since; that in the year

1852 defendant commenced to operate between Indianapolis and Terre Haute, Indiana, that portion of the railroad which it was authorized to build and operate, but did not construct nor put in operation that portion of its road between Terre Haute and the eastern boundary line of the State of Illinois until the year 1870, and since said last named year it has owned and operated only that portion of the railroad authorized by its charter of 1847 which lies between Indianapolis and said Illinois line and has never at any time owned nor operated a railroad between said Illinois line and Richmond, Indiana.

Defendant says that notwithstanding these facts which at the time of the passage of the several acts hereinafter named, were, and for many years prior thereto had been well known to the plaintiff and the relator herein, and notwithstanding the further fact that defendant on the 17th day of January 1873 filed in the office of the secretary of State of Indiana, an acceptance by it of an act entitled, "An act to provide for the incorporation of railroad companies," approved May 11th 1852, the General Assembly of the State of Indiana at its regular session in 1897, at the suggestion and under the advice of the relator herein, passed, and the governor of said State approved the following acts to which reference is made in the complaint herein, to-wit: the act of January 27th 1897, declaring that a large amount of money is due to the State of Indiana for the use of the common schools, under section 23 of the original charter, and requiring defendant to
92 furnish a statement of its expenditures, receipts and profits; the act of February 18th, 1897, amending section 36 of the general railroad law of May 11th, 1852, so as to provide that the acceptance by defendant of said railroad law should not operate as a surrender of its original charter and the acts amendatory thereof; the act of February 24th, 1897, amending section 23 of defendant's original charter so as to diminish the rights and largely increase the obligations of the defendant to the State of Indiana, as such rights and obligations existed under sections 22, 23, and 24 of defendant's original charter; the act of March 4th, 1897, appropriating for the use of the *use of the* common schools of the State of Indiana, certain alleged surplus profits arising from the operation of defendant's road, and directing the collection, by the relator herein, of said profits.

Defendant says that at the time it accepted as aforesaid, the general railroad law of 1852, it was not indebted in any — to the State of Indiana for any of the profits made by it in the operation of the railroad owned and operated by it as aforesaid, nor was it then nor is it now indebted to said State of Indiana, nor to the treasurer of said State, nor to the common schools thereof, in any sum whatever, and these facts were well known to the plaintiff and the relator herein when the several acts hereinbefore mentioned were passed by the General Assembly of the State of Indiana at the regular session thereof in 1897, and by the passage of said last named acts, and by the prosecution of this action against the defendant, The State of

Indiana, plaintiff herein, and the relator, the attorney
93 general thereof, were and are seeking to take this defendant's property for public use without just compensation and to destroy the vested rights of defendant in and to its property, earnings and profits acquired under the provisions of its original charter and the acts amendatory thereof, and to deprive this defendant of its property and the enjoyment thereof, without due process of law, all of which acts and doings defendant says are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5 and section 1 of article 14 of the amendments to said Constitution.

Paragraph III. Defendant further answering says that some time prior to 1873, The State of Indiana, plaintiff herein, on the relation of the prosecuting attorney of Putnam county, Indiana, filed an information against this defendant in the circuit court in and for the said county of Putnam, seeking a forfeiture of the charter granted defendant by the act of the General Assembly of the State of Indiana, approved January 26th, 1847, and the acts amendatory thereof, because of certain alleged acts and doings of the defenda nt set forth in said information, which acts and doings so set forth are identical with the acts and doings set forth in the complaint herein, and upon which plaintiff now bases the right of recovery herein; that said action was taken on change of venue to the circuit court in and for the county of Owen and State of Indiana, and a trial thereof in said last named court resulted in a disagreement of the jury; that subsequent to said trial and whilst said action was still pending in said Owen circuit court, an agreement was
94 made and entered into between the plaintiff herein, The State of Indiana and this defendant, under and pursuant to joint resolution No. 16 adopted by the General Assembly of the State of Indiana, entitled "A joint resolution in relation to railroad companies and corporations, and defining the duties and giving directions to the attorney-general as to suits and proceedings now pending and which may hereafter be brought."

Approved March 10th 1873, which agreement was in the words and figures following to-wit:

"The State of Indiana *ex rel.* John C. Robinson prosecuting attorney, etc., *vs.* The Terre Haute and Indianapolis Railroad Company, in the *county* Owen circuit court, October term, 1874.

"The parties to the above cause make the following agreement:

"The defendant agrees by her attorneys and officers to at any time enter the appearance of the defendant to an action to be instituted by the plaintiff (The State of Indiana) in the superior court of Marion county for the recovery of any money which may be due the State or the school fund of the State, under and by virtue of the said companies' charter of January 26th 1847, and the amendments thereto. In consideration of which said agreement, the plaintiff by her attorneys and proper officers agrees to suspend further prosecution of said action now pending in the Owen circuit court, until the final determination of such action so as aforesaid to be in-

stituted for the recovery of money; and if in said last named action the defendant shall prevail, then the said plaintiff agrees to dismiss said suit in the said Owen circuit court, and if
95 the said plaintiff in the said action to be instituted for money, shall prevail, the said action in the Owen circuit court shall be dismissed only when the defendant shall have satisfied the judgment so obtained in the latter action for money; but nothing herein shall be so construed as to compel the dismissal of said suit in the Owen circuit court, until said action so to be instituted, shall have been finally tried upon the issues joined between the parties, or it shall be found in framing the issues, and determined by the court, that no right of action exists in favor of the State or the school fund.

And it is further agreed that the agreed statement which was prepared to be and which was in part used in the trial of said cause in the Owen circuit court, may be used as evidence without objection so far as the same may be competent, in the suit to be brought by the State against said company.

"It is further agreed that either party may withdraw the depositions on file in the Owen circuit court in said cause, and may read the same, so far as the same in their subject matter may be found competent.

And that this may be done notwithstanding any order of the Owen circuit court suppressing the same; provided the party so using such depositions shall cause the same to be filed in the court where the case may be pending, twenty days before the day for which said cause is set for trial; but this agreement shall not be construed to prevent either party from taking additional depositions of the same or other witnesses. "And it is agreed that if in making
96 up the issues and on the trial of said cause it can be shown under the law, and the evidence that is adduced, that any money is due to the State or school fund of the State from said old compaay or companies (by whatsoever name or names) under and by virtue of said charter and amendments thereto and the law and facts applied thereto, then and in that case, the company as now organized shall pay such amount and judgment shall be rendered in said action for money, for the sum that may be found due.

"Nothing herein contained shall be construed to prevent the defendant from setting up any defense which existed in behalf of said old company prior to the surrender of said old charter.

Indianapolis, October 5th, 1874.

J. C. DENNY *Attorney General, Indiana.*
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY,
By W. R. McKEEN, *President.*
R. W. THOMPSON,
C. F. McNUTT,
THOS. R. COBB,
Attorneys for T. H. & I. R. R. Co.

This agreement made by the attorney general (with the concurrence of his associate counsel, as we understand) we approve.
October 5th, 1874.

THOMAS A. HENDRICKS, *Governor.*
LEONIDAS SEXTON,
Lieut. Governor.

97 Defendant says that prior to the execution of this agreement to-wit: on January 17th, 1873, it had filed in the office of the secretary of state of the State of Indiana, its acceptance of an act of the General Assembly of said State, approved May 11th, 1852, and entitled "An act to provide for the incorporation of railroad companies" and ever since the filing of said acceptance, this defendant has been and still is existing and acting as a corporation under the general laws of the State Indiana concerning railroad companies.

Defendant says that at the time the agreement hereinbefore set forth was executed, and during all the period that elapsed between the institution of said suit in the Putnam circuit court and the execution of said agreement, The State of Indiana, plaintiff herein was claiming that under the provisions of the charter of January 26th 1847, this defendant was required to pay to the treasurer of the State for the use of the common schools of said State of Indiana, a portion of its surplus profits, and that there was a large sum due from said company to The State of Indiana, plaintiff herein, for the use of its common schools, but this defendant always denied any and all such liability and indebtedness and continuously refused to pay anything on account thereof.

Defendant says that pursuant to the agreement hereinbefore set forth, The State of Indiana, plaintiff herein, on the 28th day of May 1875, instituted a suit for the recovery of money, against this defendant in the superior court of Marion county, Indiana, such suit being brought on the relation of the then attorney-general of said State of Indiana.

98 And thereupon this defendant, pursuant to the terms of said agreement, entered its appearance to said suit and on the 18th day of June 1875, filed its demurrer to the complaint therein.

And on the 6th day of March, 1876, said demurrer was sustained; thereupon The State of Indiana, plaintiff in said suit, failed and refused to amend the complaint therein and elected to stand by said complaint, and thereupon final judgment was rendered March 9th 1876, by said superior court in this defendant's favor.

Defendant says that from this judgment an appeal was taken by the State of Indiana to the general term of said superior court, and on May 29th, 1876, said judgment was affirmed and thereupon said State of Indiana appealed to the supreme court of said State, and on such appeal the judgment aforesaid of the Marion superior court was affirmed.

And defendant says that the matters adjudicated in said cause were and are one and the same with those mentioned in the com-

plaint herein, and that said judgment of March 9th, 1876, was a full final and complete settlement of all matters connected with or in any way referring to any and all claims of the State of Indiana against this defendant for the payment by defendant of any portion of its profits to the treasurer of State for the use of the common schools of the State of Indiana, under the said act of January 26th, 1847, and the acts amendatory thereof and all matters connected with or in any way referring to the claims of the State of Indiana for an accounting with, or the payment by this defendant to said State of Indiana for the use of its common schools, of any
99 portion of the profits or earnings of defendant under the terms of said original charter, or of the acts amendatory thereof.

Defendant says that The State of Indiana, plaintiff herein, and the relator herein, were fully advised of all the foregoing facts prior to the regular session of the General Assembly of said State in 1897, that the bringing of said suit in the Putnam circuit court, the trial and pendency of said suit in the Owen circuit court and the execution of the agreement hereinbefore set forth, between said State and this defendant, were all reported to the governor of said State of Indiana by the attorney-general thereof, and said report of the attorney-general was by said governor submitted with his message to the General Assembly of said State at its regular session in 1875, and the bringing of said suit in the Marion superior court, and the decision and judgment aforesaid rendered by said court in said suit in favor of this defendant, were likewise reported by the attorney-general of said State to the governor thereof, and said report was submitted by said governor with his message to the General Assembly of said State at its regular session in 1877.

Defendant says that notwithstanding these facts, the General Assembly of the State of Indiana at its regulation session in 1897, at the suggestion and under the advise of the relator herein, passed, and the governor of said State approved the four several acts of 1897, to which reference is made in the complaint herein, and that by the passage of said acts and by the prosecution of this action, The State of Indiana, the plaintiff herein, and the relator, the attorney-
100 general thereof, were and are wrongfully seeking to vacate and annull said judgment of March 9th, 1876, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired previous to 1897 under the provisions of its original charter and the acts amendatory thereof, and take this defendant's property for public use without just compensation and to deprive this defendant of its property and the enjoyment thereof without due process of law, all of which acts and doings on the part of the State of Indiana and the relator herein, are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5 of said Constitution and of section 1 of article 14 of the amendments of said Constitution.

Paragraph IV. Defendant further answering says, that each and all of the alleged fraudulent acts and doings of this defendant set

forth in the complaint herein were known to The State of Indiana, plaintiff herein, and to its then attorney-general, more than twenty-five years ago and have been known to said State and to its several attorney generals for a like period, and that with full knowledge of all said alleged fraudulent acts and doings, the State of Indiana has asserted no claim against this defendant on account of said acts and doings during the twenty years last passed, nor sought to collect from defendant by any action at law or otherwise, any of the moneys now claimed in the complaint herein to be due the said State for the use of its common schools under the terms of defendant's original charter of January 26th, 1897, and the acts amendatory thereof.

LAWRENCE MAXWELL, JR.,
CHAMBERS, PICKENS & MOORES,
Att'ys for Defendant.

JNO. G. WILLIAMS, *Of Counsel.*

June 30th, 1897.

101 And afterward, to-wit: on the 6th day of September, 1897, being the first judicial day of the September term 1897, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Come now the parties by counsel, and the plaintiff now files a demurrer to the second, third and fourth paragraphs of the defendant's answer herein in the words and figures following:"

In the Superior Court of Marion County, Indiana.

STATE OF INDIANA *ex Rel.*, &c.,
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD Company. } No. 54555.

Separate Demurrer by Plaintiff to the Second and Third and Fourth Paragraphs of Defendant's Answer.

Plaintiff demurs to the second paragraph of the defendant's answer herein, and for cause of demurrer shows that the same does not state facts sufficient to constitute a defense to said action, wherefore &c.

WILLIAM A. KETCHAM,
Attorney General.

TAYLOR, HAWKINS AND WINTER, *Of Counsel.*"

"And the plaintiff demurs to the third paragraph of the defendant's answer, and for cause of demurrer shows that the same does not state facts sufficient to constitute a defense to plaintiff's action, wherefore &c.

102 WILLIAM A. KETCHAM,
Attorney General.

HAWKINS, WINTER AND TAYLOR, *Of Counsel.*"

And plaintiff demurs to the fourth paragraph of the defendant's answer, and for cause of demurrer shows to the court that the same does not state facts sufficient to constitute a defense to said action. Wherefore &c.

WILLIAM A. KETCHAM,
Attorney General.
F. WINTER,
R. S. TAYLOR AND
R. O. HAWKINS,
Of Counsel."

"And the court being advised in the premises does now overrule the demurrer of the plaintiff to the third paragrapg of the defendant's answer herein, to which ruling the plaintiff at the time, excepts.

And thereupon, said plaintiff now files a reply to said third paragraph of answer herein, in the words and figures following, to-wit:

103 In the Superior Court of Marion County, Indiana.

STATE *ex Rel.*, &c.,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMpany. } No. 54555.

Reply to 3rd Par. of Answer.

The plaintiff for a reply to the third paragraph of defendant's answer admits that prior to 1873, an information had been filed against the defendant in the circuit court of Putnam county, asking that a forfeiture of the character of the defendant be decreed; but the plaintiff denies that the acts and doings set forth iu said information are identical with the acts and doings set forth in the compalint herein.

Plaintiff admitts that the venue of said cause was changed to Owen county and that a trial was had, and that the jury failed to agree upon such trial.

Plaintiff admits that the instrument of writing set forth in said answer was entered into between James C. Denny, who was then the attorney general of the State of Indiana, and the defendant, The Terre Haute and Indianapolis Railroad Company, and,

Plaintiff admits that said instrument was approved by the then governor and lieutenant governor of the State; but plaintiff avers that said approval by said governor and lieutenant governor
104 was made, and would not have otherwise been made, upon the information and belief that said instrument was made by said Denny with the concurrence of his associate counsel, but the plaintiff denies that said instrument was made or entered into by said Denny with the concurrence of his associate counsel, but that on the contrary said Denny at the time carefully concealed from the then associate counsel of said Denny—the Honorable Solomon Claypool and the Honorable William R. Harrison—the fact that he was contemplating executing such an instrument, and the same was made wholly without their concurrence or consent, and against their wishes, as well known to said Denny, and without any warrant or authority in law.

Plaintiff admits that prior thereto, to-wit: on January 17, 1873, said defendant not having accounted to the treasurer of State, to the General Assembly, or to any other officer or agent, either of the State or of the General Assembly thereof, for its earnings as required by section 23 of its charter, for the use of common schools, in order the more effectually to prevent the State and the General Assembly thereof from requiring an accounting from it of its receipts, did undertake to accept, and did file its acceptance in writing with the secretary of state of the general railroad law of the State; but the plaintiff submits that such acceptance and such action ought not either in law or in equity to preclude the State from enforcing the obligation in favor of the State for the use of its common schools whenever the General Assembly might authorize appropriate action to enforce the same to be taken.

105 Plaintiff admits that at the time *if* the execution of said instrument and during the period between the institution of said suit in the Putnam circuit court and the execution of said instrument, it was claimed by the executive and administrative officers of the State concerned in the institution and prosecution of said suit and *and* the making of said agreement, that upon the law as it then existed and the facts as stated in said information, which did not allege that any denial of liability had ever been made by the defendant, or that any demand for an accounting or payment had been authorized or made by the plaintiff therein, or any one thereunto duly authorized, the defendant under the provisions of its charter was required to pay to the treasurer of State for the use of its common schools, its surplus profits as alleged in said information, and it avers that the defendant at all times by the means and devices set forth in the complaint herein, which by reference are made a part of this reply, sought to prevent and did prevent any inquiry into or attempt to enforce the rights of the State in that behalf, the plaintiff expressly denies that the State, and especially the General Assembly thereof, made any claim whatever in respect of said matters, or took any action touching the same; and the plaintiff avers that defendant never denied to the State or the General

Assembly thereof that under its charter upon an accounting there would be found due to the State for the use of its common schools a large sum of money, but by the devices mentioned in the complaint, which by reference are made part hereof, concealed the same from the State and the General Assembly thereof.

106 Plaintiff admits that defendant continuously failed to pay to plaintiff, or any one in its behalf, any portion of its surplus profits, but avers that it never until shortly before the institution of this action refused to make such payment.

Plaintiff admits that a suit, as alleged in the answer, being the same suit set forth and referred to in the complaint was instituted for the recovery of money, against the defendant in the superior court of Marion county, on the 28th day of May, 1875, but the plaintiff denies that such suit was instituted pursuant to said agreement, or pursuant to any agreement, but avers that said suit was instituted by the attorney general solely upon his own judgment and that of his associate counsel at that time, no appropriate legislation authorizing suit having been enacted by the General Assembly of the State of Indiana, for the reason that by the devises and contrivances of the defendant as alleged in the complaint which allegations are by reference made a part of this reply, such legislation, and any legislation, was at all times prevented by said defendant.

Plaintiff denies that said defendant entered its appearance to said suit in accordance with said agreement, but avers that its appearance was entered to said suit for the reason that said superior court had jurisdiction thereof, and the complaint was filed and process thereon was duly served upon said defendant on, to-wit: the 28th day of May, 1875, and said appearance was entered in order to prevent a default and judgment being rendered in favor of the State.

107 Plaintiff admits the filing of a demurrer to said complaint by said defendant, and the sustaining of said demurrer by the court, and the refusal by said plaintiff to amend its complaint and a judgment in favor of said defendant, all of which are fully set forth in the complaint herein, to which reference is hereby made and by reference the allegations of said complaint and accompanying exhibits are made a part of this reply, said action being the same action and none other referred to in said answer.

Plaintiff admits and avers that an appeal was taken therefrom, and a *pro forma* judgment of affirmance was entered in the general term, from which an appeal was taken to the supreme court where said judgment was affirmed, not upon its merits, but because of an incomplete record.

Plaintiff denies that the matters adjudicated in said cause, and that the cause of action were and are one and the same with those mentioned in the complaint herein, and that said judgment of March 9, 1876, was a final and complete settlement of all matters connected with or in any way referring to any and all claims of the State against the defendants for the profits arising from the operation of said road that by said charter should have been paid to the treasurer of State for the use of common schools, or for a liability to

an accounting thereof, and plaintiff specifically avers that at the time of the institution of said suit in 1875, there had been no demand made upon said defendant for an accounting, or for the payment of any sum, nor has there been any authority conferred by the General Assembly upon the attorney general, or any other officer of the State, to demand such accounting, or payment,
108–130 or to institute a suit therefor, and said suit was instituted, prosecuted and said judgment rendered without any demand or without any authority to make any demand upon said defendant in that behalf, and there was no averment in the complaint that a demand for an accounting, or for the payment of moneys upon such accounting had been made, or that the defendant had denied its liability, or had refused to account and pay; and plaintiff says that in all respects the suit was as alleged in the complaint herein, and the allegations of said complaint and accompanying exhibits are by reference made a part of this reply.

Said complaint so filed on said 28th day of May 1875, being when said judgment was rendered, in the words and figures following:

131 Plaintiff further admits that in his report the attorney general made report of his doings to the governor and the governor submitted his messages to the General Assembly, as shown by the public records of the State; but the plaintiff denies that the rights of the State are to be precluded, or the State estopped from action, because of the non-action by the then General Assembly of said State.

Plaintiff admits that the General Assembly of the State, at its session in 1897, enacted certain laws with respect to the enforcement of the rights of the State against said defendant, touching its liability for the payment of its surplus earnings to the treasurer of State for the use of common schools; but defendant denies that by said acts or either or any of them the State of Indiana is wrongfully or otherwise seeking to vacate or annul said judgment of March 9, 1876, or to destroy the vested rights of said defendant in and to its property, earnings and profits, or either of them, acquired previous to 1897, under said charter or acts amendatory thereof, or to take defendant's property for public use, without pay or other compensation, or to deprive the defendant of its property or the enjoyment thereof, without due process of law; but on the contrary said acts were enacted for the purpose of providing for the enforcement against said defendant of the rights in favor of the State, as they at the time existed, without seeking in any manner whatever to change said rights or to create any new or other liability than such as then rested upon said defendant, and,

132 Plaintiff denies that the matters and facts set forth in the complaint have ever been adjudicated by any court of competent jurisdiction, and that the State has estopped itself in any manner whatever from enforcing its rights against said defendant; but submits that said defendant ought in equity and good conscience to be required to account to the plaintiff as averred and set forth in

the complaint, for its net earnings for the use of common schools, and asks judgment accordingly, notwithstanding the facts set forth in said third paragraph of answer, and plaintiff prays for all proper relief.

WILLIAM A. KETCHAM,
Attorney General.

HAWKINS, TAYLOR & WINTER, *Of Counsel.*

133 And afterwards, to-wit on the first day of October 1897, being the 23rd judicial day of the September term, 1897, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Comes the defendant by counsel, and by leave of the court, files the following additional paragraphs of answer to the complaint herein, to-wit: five, six, seven, eight, nine and ten.

134 STATE OF INDIANA, } ss:
Marion County, }

Superior Court, September Term, 1897, Room 3.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

Comes now the defendant in the above entitled cause, and for further answer to the complaint herein says:

Paragraph 5. That plaintiff's cause of action accrued more than six years prior to the commencement of this suit.

Paragraph 6. That plaintiff's cause of action accrued more than fifteen years prior to the commencement of this suit.

Paragraph 7. That plaintiff's cause of action accrued more than twenty years prior to the commencement of this suit.

Paragraph 8. That as to so much of the complaint as seeks to recover moneys claimed to be due prior to September 19th, 1866, defendant says plaintiff's cause of action for such moneys accrued more than fifteen years prior to the 19th day of September, 1881.

Paragraph 9. That as to so much of the complaint as seeks to recover moneys claimed to be due prior to September 19th, 1861, defendant says plaintiff's cause of action for such moneys accrued more than twenty years prior to the 19th day of September, 1881.

135 Paragraph 10. That plaintiff's cause of action accrued more than six years prior to September 19th, 1881.

LAWRENCE MAXWELL, JR.,
CHAMBERS, PICKENS & MOORES,
Attorneys for Defendant.

JOHN G. WILLIAMS, *Of Counsel.*

136 "Comes also the plaintiff and files a separate demurrer to each paragraph of said additional answer, as follows, viz:"

STATE OF INDIANA *ex Rel.*, &c., *vs.* THE TERRE HAUTE AND INDIANAPOLIS Railroad Company.	No. 54555. Room 3. Separate Demurrer to the 5th, 6th, 7th, 8th, 9th, and 10th Paragraphs of Answer.

The plaintiff demurs separately and severally to the 5th, 6th, 7th, 8th, 9th, and 10th paragraphs, respectively, of the defendant's answer and for cause of demurrer to each of said paragraphs separately plaintiff says that said paragraph does not state facts sufficient to constitute a defense to said action. Wherefore &c.

WILLIAM A. KETCHAM,
Attorney General.

R. O. HAWKINS,
R. S. TAYLOR, AND
FERDINAND WINTER,
Of Counsel for Plaintiff."

And the defendant now files its demurrer to plaintiff's reply to the third paragraph of the defendant's answer herein, in these words and figures:"

137 STATE OF INDIANA:

In the Marion Superior Court, Room 3.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General, *vs.* THE TERRE HAUTE AND INDIANAPOLIS RAILROAD Company.	No. 54555.

The defendant demurs to the plaintiff's reply to the third paragraph of the defendant's answer to the complaint herein, and for cause of demurrer says:

1. That the facts stated in said reply are not sufficient to avoid the said third paragraph of defendant's answer.

LAWRENCE MAXWELL, JR.,
CHAMBERS, PICKENS & MOORES,
Attorneys for Defendant.

JOHN G. WILLIAMS, *Of Counsel.*"

And afterwards, to-wit: on the twelfth day of November, 1897, being the 11th judicial day of the November term, 1897, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Come now the pa-ties by counsel and the court having examined the plaintiff's demurrer to the second, fourth, fifth, sixth, seventh, eighth and tenth paragraphs of defendant's answer herein, and having heard argument thereon and being fully advised in the premises, sustains the said demurrer, to which the defendant, at the time, excepts.

Also, the court having examined plaintiff's demurrer to the ninth paragraph of the answer of said defendant herein, and having
138 heard argument thereon, and being fully advised in the premises, now overrules the said demurrer, to which ruling plaintiff, at the time, excepts: and plaintiff is ruled to reply over — the said ninth paragraph of answer herein.

Also the court having examined the demurrer of the defendant to plaintiff's reply to the third paragraph of the defendant's answer herein and having heard argument thereon and being fully advised in the premises, overrules said demurrer, to which ruling the defendant, at the time excepts."

And afterwards, to-wit: on the 17th day of November, 1897, being the 15th judicial day of the November term, 1897, of said court, before the same hon. judge, the following proceedings were had herein:

"Comes the defendant and by leave of the court, files its eleventh (11) paragraph of answer herein, and the plaintiff is ruled to reply to same: Said 11th paragraph of answer is in these words:"

STATE OF INDIANA, } ss.
Marion County, }

Superior Court, Room 3.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

Defendant further answering the complaint in the above entitled cause says:

139 Paragraph II. That each and all of the alleged fraudulent acts and doings of this defendant set forth in the complaint herein were known to The State of Indiana, plaintiff herein, and to its attorney general more than twenty-five years ago, and prior to 1872 the said plaintiff filed against this defendant in the circuit court in and for the county of Putnam, and State of Indiana, an information, seeking a forfeiture of the charter of this defendant because of certain alleged acts and doings of the defendant set forth in said information, which acts and doings so set forth were and are identical with the acts and doings set forth in the complaint herein,

and upon which plaintiff now bases its right to recover herein; that said action was taken on change of venue to the circuit court in and for the county Owen, and State of Indiana, and a trial thereof, which was had in the year 1874, resulted in a disagreement of the jury; that thereupon the plaintiff herein abandoned the further prosecution of said action, and on the 28th day of May, 1875, instituted a suit against this defendant in the superior court of Marion county, Indiana, to recover money which it was alleged was due to the State of Indiana from the defendant under the terms of the defendant's charter set forth in the complaint herein; that the complaint in this last-named suit — forth each and all of the alleged fraudulent acts and doings of this defendant exactly as the same were set forth in said information and are set forth in the complaint, to which this is an answer, and in said last-named suit the said State of Indiana based its claims to recover the money alleged to be due to it from this defendant, upon the same identical allegations that are stated as a basis for recovery in the complaint to which this is an answer; that on the 18th day of June,
140 1875, defendant filed its demurrer to the complaint in the suit aforesaid, and on the sixth day of March, 1876, said demurrer was sustained, and thereupon The State of Indiana, plaintiff in said suit, failed and refused to amend the complaint therein and elected to stand by said complaint, and thereupon final judgment was rendered March 9th, 1876, by said Marion superior court in this defendant's favor.

Defendant says that from this judgment an appeal was taken to the general term of said superior court, and on May 29th, 1876, said judgment was affirmed, and thereupon said State of Indiana appealed to the supreme court of said State, and on such appeal, the judgment aforesaid of the Marion superior court was affirmed, and from this last affirmance of said judgment until the bringing of *of* this action, the said State of Indiana fully acquiesced in the decision rendered as aforesaid in this defendant's favor by the superior court of Marion county, and took no steps whatever to assert any claim against this defendant, nor to enforce the collection of any such claim in any manner whatsoever.

Defendant says that in the year 1887, a majority of all its outstanding capital stock was sold by the then holders of it, to purchasers in good faith who paid full value therefor without notice or knowledge of any kind whatsoever that the State of Indiana had or pretended to have any claim against this defendant, based upon the old charter of 1847, which said charter, together with all the amendments thereof, this defendant surrendered in 1873, and the said State of Indiana accepted the surrender thereof without asserting or reserving the right to assert any claim against this
141 defendant because of any of its acts and doings during the time said charter was in force and effect.

Defendant further says that in August, 1893, a controlling interest in the whole capital stock then outstanding, of this defendant, was again sold for full value to purchasers in good faith, who

bought and paid for the same without notice or knowledge of any kind or description that the plaintiff herein claimed any right whatever to recover anything from this defendant, because of any money due to the State of Indiana under the terms of the charter set forth in the complaint herein, and the last purchasers of said controlling stock still hold the same, and the value thereof, together with the value of all the rest of the capital stock of this defendant, will be greatly reduced if not destroyed, should the plaintiff herein be permitted to enforce the claim now set up by it against this defendant in the complaint herein.

Defendant further says that relying upon the acquiescence of the State of Indiana in the judgment aforesaid, rendered in this defendant's favor by the said superior court of Marion county, defendant largely extended its operations, and has handled its property and funds and incurred large obligations, believing that it had a perfect right to do so, without being called upon to account for or pay over any of its profits made prior to the year 1873, to the State of Indiana, and should this defendant now be compelled to account for and pay over to said State of Indiana the profits now claimed in this action, it would work a great and irreparable injury to this defendant and its stockholders, and render it unable to perform its obligations, or carry on its business.

142 Defendant says that all the matter and things herein set forth are well known to said State of Indiana, and in anticipation of this defendant's inability to pay the claim now sought to be enforced in this suit, the General Assembly of the State of Indiana, at its regular session in 1897, authorized the purchase at judicial sale, of this defendant's property, and directed the governor of said State, with the concurrence and consent of the secretary of state and auditor of state to designate and appoint the proper officers to take charge of and operate said property, or release the same until provision should be made by the General Assembly for the disposition of said property.

Defendant says that notwithstanding the premises, the said State of Indiana, plaintiff herein, and the relator, the attorney-general of said State, are now wrongly seeking to vacate and annul said judgment of the superior court of Marion county, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired previous to 1873 under the provision of its original charter, and the acts amendatory thereof, and to take this defendant's property for public use without just compensation, and to deprive this defendant of its property and the enjoyment thereof without due process of law, all of which acts and doings on the part of said State of Indiana and said relator are in violation of section 10 of article I of the Constitution of the United States, and of article 5 and of section I of article 14 of the amendments to said Constitution.

Defendant further says that all the persons who, either as directors or other officers, or agents, managed and controlled its affairs for the first twenty years of its existence, died before the com-

143 mencement of this action, as did also many of those who controlled and managed its affairs between 1867 and 1877,

and defendant is therefore unable properly to defend against the alleged wrongs set forth in the complaint herein, and may be wholly prevented from making successful defense in this action by reason of its inability to procure the testimony of those persons who controlled and managed its affairs as aforesaid, and who died previous to the commencement of this action, and previous to any assertion on the part of the State of any right whatever to recover any part of the profits earned by this defendant in the operation of its railroad prior to 1873.

Defendant further says that ever since the judgment rendered in its favor as aforesaid by the superior court of Marion county, was affirmed by the supreme court of Indiana, the said State of Indiana, plaintiff herein, has, with full knowledge of all facts, permitted this defendant to deal with its railroad and the earnings and profits thereof, under the belief always entertained by this defendant, that said judgment was recognized by said State of Indiana as being a final settlement of all questions concerning said State's claim to any part of the profits earned by this defendant in the operation of its railroad under the charter aforesaid of 1847 as originally granted, or afterwards amended; the defendant says that for twenty years said State of Indiana took no steps whatever to impeach said judgment and prior to the bringing of this action neither claimed nor pretended that it had any right to do so, or to assert that in the proceedings which resulted in said judgment the right of said State of Indiana to recover from this defendant any part of the
144–149 profits earned in the operation of said railroad were not fully presented and adjudicated.

Wherefore defendant says that the plaintiff is not entitled to recover in this action, and prays judgment accordingly.

S. O. PICKENS,
LAWRENCE MAXWELL, JR.,
Attorneys for Defendant.

JOHN G. WILLIAMS, *Of Counsel.*

And afterwards to wit: on the 29th day of December, 1897, being the 21st judicial day of the December term 1897, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Comes the plaintiff by counsel and files its motion to strike out parts of the eleventh paragraph of the answer of the defendant; said motion to strike out being in the words and figures following:

150–155 And afterwards, to-wit, on the 15th day of January, 1898, being the 12th judicial day of the January term 1898, of said court, before the same hon. judge, the following proceedings were had herein:

"Come the parties as aforesaid and the court being fully advised in the premises, overruled the plaintiff's motion to strike out parties of the eleventh paragraph of the defendant's answer herein, to which

ruling plaintiff, at the time, excepted, and was given ten days by the court in which to file its bill of exceptions."

And afterwards, to-wit, on the 22nd day of January 1898, being the 18th judicial day of the January term 1898, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Comes the plaintiff by counsel, and files its bill of exceptions No. I, herein, as follows, viz:

156 "Plaintiff also files its motion to separate the eleventh paragraph of the answer into paragraphs as follows, viz:"

STATE OF INDIANA, } ss:
Marion County, }

In the Superior Court, January Term, 1898, Room 3.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General,
vs.
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

(*Motion to Require Defendants to Separate the 11th Paragraph of Answer into Paragraphs and to Number Them.*)

The plaintiff moves the court to require the defendant to separate the 11th paragraph of defendant's answer to complaint herein into paragraphs and number the same, for the reason that the said paragraph contains and sets forth two separate and distinct defenses to the complaint.

WILLIAM A. KETCHAM,
Attorney General.

R. S. TAYLOR,
FERDINAND WINTER,
HAWKINS AND SMITH,
Attorneys for Plaintiff.

And afterwards, to-wit: on the 16th day of February 1898, being the 9th judicial day of the February term, 1898, of said court, before the same hon. judge, the following proceedings were had herein, viz:

157 & 158 "Come the parties by counsel, and the court, being fully advised, overrules the plaintiff's motion to separate the eleventh paragraph of the answer herein into paragraphs, to which ruling plaintiff excepts and is given twenty (20) days in which to file a bill of exceptions."

And afterwards, to-wit: on the 5th day of March, 1898, being the 24th day of the judicial term, February, 1898, of said court, before

the same hon. judge, the following proceedings were had herein, viz:

"Comes the plaintiff and files the following bill of exceptions, No. 2."

* * * * * * * *

159 Plaintiff also files his demurrer to the eleventh paragraph of defendant's answer herein, in these words and figures, viz:

STATE OF INDIANA, } ss:
Marion County, }

Superior Court.

STATE OF INDIANA *ex Rel.* W. A. KETCHAM, Attorney General,
vs.
TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

The plaintiff demurs to the 11th paragraph of the answer of the defendant herein, and for cause says, that the said paragraph of answer does not state facts sufficient to constitute a good defense to the plaintiff's complaint herein.

W. A. KETCHAM,
Attorney General.
R. S. TAYLOR,
F. WINTER,
HAWKINS AND SMITH,
Attorneys for Plaintiff."

And afterwards, to-wit: on the 13th day of April 1898, that being the 9th judicial day of the April term 1898, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Come the parties by counsel and the court, having examined the plaintiff's demurrer to the eleventh paragraph of defendant's answer herein, and having heard argument thereon and being fully advised in the premises, sustains the same, to which ruling the defendant, at the time, excepts."

160–177 And afterwards, to-wit: on the 27th day of April, 1898, being the 21st judicial day of the April term 1898, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Come now the parties by their respective counsel, and the plaintiff files his reply in general denial to the ninth paragraph of the defendant's answer to the complaint herein; said reply being in the words and figures following, that is to say"

Superior Court.

STATE *ex Rel.*
vs.
TERRE HAUTE AND INDIANAPOLIS RAILroad Company. } No. 54555. Reply to 9th Paragraph of Answer.

The plaintiff for reply to the ninth (9) paragraph of the defendant's answer, says that it denies each and every material allegation therein contained, and prays judgment as asked in the complaint.

WILLIAM A. KETCHAM,
Attorney General.
R. S. TAYLOR,
F. WINTER,
HAWKINS AND SMITH,
Attorneys for Plaintiff."

"And the plaintiff now files its motion for an order upon the defendant to produce the books, papers, vouchers, reports &c., as named in said motion: the motion being in the words and figures following:"

178 And afterwards, to-wit: on the 24th day of May 1899, being the 21st judicial day of the May term, 1899, of said court, before the same hon. judge, the following proceeding was had herein, viz:

"Comes the plaintiff by counsel and files its petition for a reference of this cause to a master commissioner, as follows, viz:

"STATE OF INDIANA, } ss:
Marion County, }

Superior Court.

STATE *ex Rel.*, &c.,
vs.
TERRE HAUTE AND INDIANAPOLIS RAILroad Company. } No. 54555. Petition for Reference to Master Commissioner.

The plaintiff shows the court that the action herein is for accounting and for judgment for a very large sum of money upon such accounting and that the action is therefore equitable in its character and not triable by jury.

Plaintiff further shows that in preparation for the trial of said action, it has caused an examination to be made of the books of the defendant by experts, and that said books are still being examined, but the investigation is about completed; that upon the trial of said cause it will be necessary to inquire into the expense of constructing and operating said road, and also into the gross and net receipts

thereof from the year 1847 to the year 1873; that in the nature of the case the testimony will be very voluminous and of such a character that it would be utterly impossible for a jury, having no right to take notes of the evidence and to take with them to their
179 jury room tables of figures or the data necessary to be considered to arrive at a correct conclusion, and that for that reason it is wholly impossible to submit said cause to a jury upon the entire issues involved, with the hope that the jury would carry in its mind all the facts essential to arriving at a correct conclusion.

And plaintiff therefore moves the court to refer this cause to a special master commissioner, to report to the court the facts and conclusions and the evidence submitted to him, to the end that the court may, upon such report and such evidence render a proper decision in the case. And if for any reason the court should prefer to hear the evidence and decide the case without the intervention of a master, then the plaintiff asks that in such event said cause will be set down for hearing before the court without the intervention of a jury. And plaintiff prays for such other and further order in the premises, as may to the court seem proper.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Attorneys for Plaintiff."

WILLIAM A. KETCHAM,
Special Counsel for the State."

180 "STATE OF INDIANA, } ss:
Marion County, }

William A. Ketcham, being first duly sworn, on his oath states that he is special counsel for the State, charged by law with the conduct of said litigation in connection with his associates, and that the matters and facts set forth in the above and foregoing petition are true, and further affiant saith not.

WILLIAM A. KETCHAM.

"Subscribed and sworn to before me, a notary public, within and for said county and State, this 23rd day of May, 1899.
Witness my hand and notorial seal.

CATHARINE REYNOLDS,
[SEAL.] *Notary Public.*"

Commission expires February 6, 1903."

And afterwards, to-wit: on the first day of July, 1899, being the 24th judicial day of the June term 1899, of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Come now the parties and the court being sufficiently advised in the premises, sustains the motion of the plaintiff for a reference of this cause, filed herein on the 24th day of May, 1899.

And it is therefore ordered by the court that this cause be and the same hereby — referred to Noble C. Butler, a fit and competent person, as master commissioner, to hear and report to the court the evidence together with his findings of fact and conclusions of law therein; to which ruling and order the defendant, at the time, excepts, and ten days' time is allowed it in which
181 to prepare and *and* file its bill of exceptions. And day is given.

And afterwards, to wit: on the 11th day of July, 1899, being the 9th judicial day of the July term, 1899 of said court, before the same hon. judge, the following proceeding was had herein:

"Comes the defendant by counsel and files the following bill of exceptions:"

STATE OF INDIANA, } *ss:*
Marion County, }

STATE OF INDIANA *ex Rel.*, &c.,
vs.
TERRE HAUTE AND INDIANAPOLIS RAILroad Company. } No. 54555. Defendant's Bill of Exceptions.

Be it remembered, that on the 24th day of May A. D. 1899, plaintiff in the above entitled cause filed its petition herein in the words and figures following, to wit:

182 STATE *ex Rel.* &c.,
vs.
TERRE HAUTE AND INDIANAPOLIS RAILroad Company. } No. 54555. Petition for Reference to Master Commissioner.

The plaintiff shows the court that the action herein is for an accounting and for judgment for a very large sum of money upon such accounting, and that the action is therefore equitable in its character and not triable by jury.

Plaintiff further shows that in preparation for the trial of said action, it has caused an examination to be made of the books of the defendant by experts, and that said books are still being examined, but the investigation is about completed; that upon the trial of said cause, it will be necessary to inquire into the expense of constructing and operating said road, and also into the gross and net receipts thereof from the year 1847 to the year 1873; that in the nature of the case the testimony will be very voluminous and of such a character that it would be utterly impossible for a jury, having no right to take notes of the evidence and to take with them to their jury room tables of figures or the data necessary to be considered to arrive at a correct conclusion, and that for that same reason it is wholly impossible to submit said cause to a jury

upon the entire issues involved, with the hope that the jury would carry in its mind all the facts essential to arrive at a correct conclusion. And plaintiff therefore moves the court to refer this cause to a special master commissioner, to report to the court the facts and conclusions and the evidence submitted to him to the end
183 that the court may upon such report and such evidence render a proper decision in the case. And if for any reason, the court should prefer to hear the evidence and decide the case without the intervention of a master, then the plaintiff asks that, in such event, said cause will be set down for hearing before the court without the intervention of a jury. And plaintiff prays for such other and further order in the premises as may to the court seem proper.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Attorneys for Plaintiff."

WILLIAM A. KETCHAM,
Special Counsel for the State."

STATE OF INDIANA, } ss:
Marion County. }

William A. Ketcham, being first duly sworn, on his oath states that he is special counsel for the State, charged by law with the conduct of said litigation in connection with his associates, and that the matters and facts set forth in the above and foregoing petition are true, and further affiant saith not.

WILLIAM A. KETCHAM."

184 "Subscribed and sworn to before me, a notary public within and for said county and State, the 23rd day of May, 1899. Witness my hand and notarial seal.

KATHARINE REYNOLDS,
Notary Public."

Commission expires February 6, 1903.

And be it further remembered that the foregoing petition coming on to be heard by the court, the defendant in the above entitled cause, objected to any reference of this cause to a special master or a trial of the same by the court without the intervention of a jury, upon the ground, at the time stated to the court, that under the statutes of the State of Indiana this cause was triable by jury as a matter of right, but the court overruled the objections of the defendant, and on the first day of July, A. D. 1899, entered an order in said cause referring the same to Noble C. Butler, as master, to hear and report the evidence together with his findings of fact and conclusions of law thereon.

And to the entering of this order and the reference of this cause

to a master, the defendant herein, at the time, excepted for the reason that under the fifth amendment to the Constitution of the United States and under section 1, of the fourteenth amendment to the Constitution of the United States, this defendant must not be denied the equal protection of the laws, and that to deny to it the right of a trial of this cause by a jury, was, in effect, a denial to it of the equal protection of the laws, and an attempt to deprive this defendant of its property without due process of law.

185 And on said first day of July, A. D. 1899, the court, having given to this defendant ten days within which to file a bill of exceptions herein, now within the time allowed as aforesaid, the defendant presents this its bill of exceptions, to the court and prays that the same may be signed, sealed, and made a part of the record herein. All of which is done this 11th day of July, A. D. 1899.

VINSON CARTER, *Judge.*"

And afterwards, to-wit: on the 19th day of April, 1900, being the 16th judicial day of the April term, 1900, of the said court, before the said hon. judge the following proceeding was had herein, that is to say:

Comes Noble C. Butler, master commissioner to whom this cause was referred, and files his report herein together with the evidence accompanying the same; which report is as follows, viz:"

186 In the Superior Court of Marion County.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General, *vs.* THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.	No. 54555.

Finding and Report of Noble C. Butler, Special Master in Chancery.

To the honorable the judges of the superior court of Marion county:

This cause comes to me under an order of reference from the superior court of Marion county upon the complaint and three paragraphs of the answer, which set up the general denial, a former adjudication, and the statute of limitations as to so much of the complaint as seeks to recover moneys claimed to be due prior to September 19th 1861, and a reply in two paragraphs, including a general denial to the answer of the statute of limitations and a special reply to the answer of a former adjudication.

The complaint is founded upon a contract, which is claimed by the plaintiff to exist under and by virtue of sections 22 and 23 of the special charter for the incorporation of the defendant, which was enacted by the General Assembly of the State of Indiana, and approved on January 26th, 1847, and was duly accepted by the defend-

ant, and charges the defendant with fraudulent acts and
187 representations whereby the plaintiff has been misled and defrauded of its rights and a recovery upon the contract has been delayed and prevented. In brief, the contract which is claimed to have its existence in these sections is that the corporation, in consideration of a grant of exemption from the legislative control of its tolls and freights until the aggregate amount of its dividends should equal the full sum invested in its plant and property and ten per centum per annum on the same, promised to pay the State on the happening of that event and thereafter a total sum of money which is estimated in the prayer of the complaint at three million dollars. The provisions of sections 22 and 23 are as follows:

"SEC. 22. The corporation may charge and receive such tools and freights for the transportation of persons, commodities, and carriages on said road, or any part thereof, as shall be for the interest of said company, and to change, lower or raise at pleasure: Provided, that the rates established from time to time shall be posted in some conspicuous place or places on said road.

SEC. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and reserving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tools and freights so that a dividend
188 of fifteen per centum per annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

On the hearing before me the plaintiff was represented by Messrs. William A. Ketcham, Robert S. Taylor, Ferdinand Winter, and Roscoe O. Hawkins as its attorneys, and the defendant was represented by John G. Williams, Lawrence Maxwell, Jr., and Samuel O. Pickens as its attorneys. The evidence consists of the books and records of the corporation and the testimony of George C. Duy, John E. Cleland, and Joseph T. Fanning, concerning the accounts and entries in them, and William R. Harrison. All of the testimony of the witnesses, with tables and statements which were prepared from the books by the witnesses, are herewith returned into court; the testimony of the witnesses, being contained in two volumes marked Exhibit A and B, and the tables and statements being contained in a single volume marked Exhibit C.

The reference to me in this case is not for an accounting only. It requires me to find and determine whether an account should be stated between the parties, and it also requires me to find and deter-

mine a just and proper basis for the statement of an account between them, if any should be made.

In the performance of these duties it is necessary for me to have an adequate understanding of the whole controversy between the parties; and the order of reference expressly provides that I shall find and report all the facts that are involved in it with my conclusions of law thereon. The controversy has its origin in the 22nd
189 and 23rd sections of the special charter, under and by which the defendant was incorporated, and is essentially a controversy over the construction which shall be given those sections. In overruling the demurrer to the complaint and the reply to the third paragraph of the answer the superior court rendered opinions which cover some of the points that are involved in the construction of the charter, but there is further controversy as to the precise meaning and application of these opinions.

The primary object in any construction of these sections is to ascertain the intention of the legislature in the enactment of them. It is impossible for me to ascertain the intention of the legislature in the enactment of particular words and phrases in these sections without having previously ascertained the intention of the legislature in the enactment of them as a whole. Its intention in the enactment of these sections as a whole pervades and dominates every part of them. If it be my duty to ascertain the intention of the legislature in the enactment of any part of these sections, it is equally my duty to ascertain its intention in the enactment of them as a whole; and the performance of that duty, which involves an exercise of judicial functions, should be governed by those rules of law and equity that have been established by the weight of authority.

A familiar rule of construction requires that a charter, as far as it is a grant of powers and franchises, should be construed strictly against the grantee, and that all doubts should be solved against such grantee. Another rule of special stringency is that an intention to grant immunity from taxation, or exem-tion from the
190 legislative control of tolls and freights, should never be imputed to a legislature if it be possible to avoid doing so by any reasonable construction of the charter. Covington Turnpike Co. *vs.* Sandford, 164 U. S. 572, 587, 589, and cases cited. These are general rules for the construction of all charters, and they are founded in public policy. They are applied by the courts to the construction of all charters because the public interests are, on the whole, protected by a uniform and consistent application of them. As applied to the present case they do not mean that the charter should be construed one way if the corporation were claiming an exemption from legislative control, and another way if the State has a pecuniary interest in conceding that it has such an exem-tion. They do not mean that in all suits where the State is a party every doubtful question shall be solved in favor of the State, any more than they mean that in all suits where a corporation is a party every doubtful question shall be solved against the corporation. They

relate to the subject matter of controversies and not to the parties in them.

As applied to the case at bar these rules mean that if a reasonable construction of sections 22 and 23 can be adopted which avoids or excludes any theory of an irrevocable grant of exemption from the legislative control of tools and freights for an indefinite or any period of time, by the State to the corporation, that construction must be adopted.

In order to meet the requirements of these rules it is wholly unnecessary that any strained or unnatural construction of the language that is used in sections 22 and 23 should be adopted, and such a construction of it would be inadmissible. The most
191 natural and obvious construction that can be put upon the language of these sections fully satisfies the requirements of these rules. Section 22 authorizes the corporation to regulate its tolls and freights, and section 23 provides that the legislature may regulate them on the happening of the contingency and within the limits therein described, and provision is made in the latter section for the disposition of any surplus that may remain after such regulation is made; and that section also contains a provision that the regulation of tolls and freights by the legislature shall not reduce them below the mimimum fixed thereby, which if construed by itself and without reference to another provision in section 36, is a contract which binds the State absolutely. As construed together these sections mean that the authority which is given the corporation in section 22 is or may be limited under section 23; or, in other words, that the corporation is authorized to regulate its tolls and freights until the legislature shall regulate them.

But the State contends that these sections constitute a contract whereby the legislature was prohibited from regulating the tolls and freights of the corporation until the happening of the contingency which is described in section 23, by reason of a grant of exemption from the legislative control of tolls and freights until the happening of that contingency which forms a part of the contract, and is the consideration for the liability upon which the present suit is instituted.

It is, therefore, necessary to make further inquiry into the nature of the authority which was given by section 22, and the nature of the limitation which was placed upon that authority by section 23.

192 The next question for present consideration is, accordingly, the question whether the authority which is conferred by section 22 and limited by section 23 is an irrevocable grant of the power to regulate tolls and freights for an indefinite or any period of time by the State to the corporation. If there be such a grant, it must be found in section 22, for section 23 is nothing more than a limitation upon the preceding grant, and that is evidently the theory of the complaint, as appears from the following allegation, namely:

"By said charter said corporation was given the right to charge and receive tolls and freights for the transportation of persons, com-

modities, etc., on said road, as might be deemed for the best interests of the company, and to change and lower them at pleasure, except only as to the provision in section 23 of said charter, reserving a power in the General Assembly to regulate such tolls," etc.

In other words, the provisions of section 22 must be regarded as an absolute grant of the power to regulate tolls and freights, which is limited as to the duration and extent of the same by the provisions of sections 23, which are in the nature of a condition subsequent. The provisions of section 23 are, in that view of the case, technically and strictly a condition subsequent instead of a limitation, for, by their very terms, the happening of the conditions does not, of itself, extinguish the right of the corporation under the grant, but simply makes it possible for the State to put an end to that right and resume its own right of regulating tolls and freights on the happening of the condition, or at any time afterwards.

193 If such a grant can not be found in the words of authority in section 22, it will hardly be discoverable in the words of condition or limitation in section 23.

But the provisions of section 22 are almost identical with the provisions of other charters which have been construed by the Supreme Court of the United States in cases where it was held that such provisions do not constitute an irrevocable grant of exemption from the legislative control of tolls and freights, or any contract on that basis; and while, as a general rule, the decisions of the highest court of a State in the construction of its statutes are binding on the Federal courts, there is an exception to that general rule in all cases where it is a question whether a statute is a contract or not. In those cases the Federal courts always determine that question for themselves, as well as the further question whether the contract is protected by the constitutional provision against any impairment of the obligation of it by the State. Mobile & Ohio R. R. Co. *vs.* Tennessee, 153 U. S. 486, 493, and cases cited. The decisions of the Supreme Court of the United States in determining whether any particular provision of a charter constitutes a special contract between the State and the corporation, irrespective of that sense in which the whole charter is regarded as a contract, are therefore binding on the State courts, and it is important that due consideration should be given them.

In Stone *vs.* Farmers Loan and Trust Co., 116 U. S. 307, 325, the corporation was authorized "to fix, regulate and receive the tolls and charges by them to be received for transportation of persons or property on their railroad, etc.,"

194 In Stone *vs.* Illinois Central R. R. Co., 116 U. S. 347, 351, the charter provided "that the president and directors be and they are hereby authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure."

In Chicago, Milwaukee and St. Paul Ry. Co. *vs.* Minnesota, 134 U. S. 418, 453, it was provided by the charter that the directors of the corporation should have power "to make all needful rules,

regulations and by-laws, touching the rates of toll and the manner of collecting the same."

Other cases of a similar character might be cited. In all of them the Supreme Court of the United States held that these provisions are not such contracts as are protected by the constitutional provision against any impairment of the obligation of contracts by the State, or, in other words, that they are not contracts at all, or anything more than a mere license or permission to do the things that are mentioned therein at the will and pleasure of the State, and until such time as it may see fit to withdraw or revoke the same. In Pennsylvania Company *vs.* Miller, 132 U. S. 75, 83, 84, where similar provisions were under consideration by the Supreme Court, it said that the corporation "took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, since there was no previous contract with the defendant, exempting it from liability to such future general legislation in respect of the subject matter involved. * * * Nor will the exemption
195 claimed from future general legislation, either by a constitutional provision or by an act of the legislature, be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words." Georgia Railroad and Banking Co. *vs.* Smith 128 U. S. 174, 182; City of Indianapolis *vs.* Navin, 151 Ind. 139, 143. And in Covington *vs.* Kentucky, 173 U. S. 231, 239 the Supreme Court said, concerning the surrender of another power of sovereignty which is classified in Covington Turnpike Company *vs.* Sanford, *supra*, with the power of regulating tolls and freights—one as being equally important with the other, and both as being governed by the same rules of law: "Before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly or unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from interference or conjecture."

The sole difference between the provisions which I have quoted from these other charters and the provisions of the charter which is under consideration here is in that part of section 23 which relates to the possible exercise by the State of its right to regulate tolls and freights upon the contingency and within the limits that are specified therein. But that is, under the present view of the case, a limitation of the authority which was given in section 22 in the nature of a condition subsequent and does not purport to be anything more. If the words in which that authority is given in section 22 are not sufficient to constitute an irrevocable
196 grant of exemption from legislative control over tolls and freights for an indefinite or any period of time, the words in which that authority is limited in section 23 are clearly insufficient to convert it into such a grant. A naked authority in section 22

does not, upon the conditional reservation of it in section 23, thereby become an irrevocable grant of sovereignty. A condition subsequent renders an estate or an authority defeasible, but it does not enlarge an estate or an authority in any way. It may discharge a promise, but it does not work any change in the promise itself. An agreement for the revocation of a revocable license under a particular state of circumstances does not render it otherwise irrevocable. An absolute grant in section 23 is inconsistent and irreconcilable with a mere license in section 22. If the naked authority in section 22 becomes an irrevocable grant in section 23, the provisions of the former section are rendered absolutely meaningless and are practically eliminated from the charter; and such a construction of these sections is therefore inadmissible, whether they are considered as a license or a grant, a contract or a statute, for it violates that elementary rule of construction which requires that effect shall be given every part of an instrument or a legislative enactment.

The language of section 23, either in connection with section 22, or independently of it, does not expressly or by unavoidable implication manifest a clear and unmistakable intention on the part of the legislature to surrender its control over tolls and freights for an indefinite or any period of time to the corporation. Independently of section 22 it simply provides that whenever dividends have accumulated as described ther-in, the
197 State may, by further legislation, regulate the tolls and freights of the corporation in a particular way. The legal inference from the language of that provision is that, in the meantime and until the State should regulate the tolls and freights of the corporation, the mutual rights of the parties in that respect were to remain and continue as they existed under the common law when that provision was adopted. At and since that time the corporation had a right, without any provision in the charter concerning tolls and freights, under the common law and as an incident of other provisions in the charter, to charge reasonable prices for its services. Stone *vs.* Farmers Loan and Trust Company, *supra*. Under the common law the State had a right to control these prices within reasonable limits. The right of the corporation was subordinate to the right of the State. Munn *vs.* Illinois, 94 U. S. 113. The provisions of sections 22 and 23 were simply declaratory of the common law, and they did not change the common law except as they fixed the minimum of regulation by the State; and a legally sufficient consideration for that provision was the consideration for the charter as a whole and for every other part of it which was, according to the case of Dartmouth College *vs.* Woodward, 4 Wheat. 517, the public benefit, or the promise and undertaking of the corporation as it is described by me on page 12. The State did not, by express reservation of its right to interfere with the corporate regulation of tolls and freights under special circumstances and in a particular way, impliedly surrender its general right of interference therewith under all other circumstances and in every other

way unless the retention of that general right is inconsistent with the reservation of the special and particular right, and it will hardly be contended that there is any inconsistency between these rights, or that they may not exist together in the State. In Georgia Railroad and Banking Company *vs.* Smith, *supra*, it was held that the surrender "must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power of the State." As the corporation had a right, without any provision in the charter concerning tolls and freights, to regulate its own tolls and freights in subordination to the right of the State to interfere with the corporate regulation of them *t*henever it was deemed necessary or proper to do so, and as these mutual rights of the parties were not abri-ged by the provisions of the charter, it is evident that the corporation did not acquire or have any exemption from the legislative control of its tolls and freights by reason of the provisions of section 23, or as a result of them, and that there was not any such consideration for its liability in the present suit.

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And as the provisions of section 22 do not, under the cases which I have cited, constitute an irrevocable grant, or an irrepealable contract, there is nothing in them which is properly the subject of a condition or limitation in section 23 within the legal definition of these terms. The State did not part with any right and the corporation did not acquire any right under section 22. The rights of the parties were precisely the same under that section as they would have been without it. With or without that section the corporation was authorized to regulate its tolls and freights until the State exercised its right to regulate them. If there was any abridgment, or enlargement, or modification of these rights of the parties, it must have been accomplished by an independent grant or contract in section 23; and I have shown that such a grant or contract does not exist therein. An express reservation of the right of the State to regulate tolls and freights was unnecessary. If the right was not surrendered it was retained. And the State does not specifically reserve a "right" in section 23, as it does in section 30 and 35 and 36, but it assumes that a right already exists without a specific reservation of it. A general right of regulating the tolls and freights of the corporation was therefore retained by the State and existed in it without the provision in section 23 concerning them; and that provision was really nothing more than a special notice of an intention to exercise that right under a particular state of circumstances, or that a particular state of circumstances would be regarded as an occasion for the exercise of it. One of the functions of such a provision in any view of it is to give notice of what the State may do in the exercise of its rights, whether they are expressly retained, or retained by reason of not being surrendered; and all other conceivable functions of the provision in section 23 concerning tolls and freights being impossible or unnecessary, the sole function that it can effectively perform is the function of giving such notice, and that, in my opinion, is all that was intended

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by it. Sinking Fund cases, 99 U. S., 700. The promise and undertaking of the corporation was that, whenever the State, by a legislative enactment, exercised its right to regulate tolls and freights under the circumstances that were indi-
200 cated by the special notice, and any balance of surplus profits remained after paying expenses and reserving such proportion as might be necessary for future contingencies, the corporation would pay such balance to the State; and either the minimum of regulation as fixed by section 23, or the privileges of the charter as a whole, was a legally sufficient consideration for that promise and undertaking. A reasonable regulation of tolls and freights might have been made by the State on any other occasion or under any other circumstances; it might have regulated them at any time before the dividends were equal to the investment and ten per centum per annum thereon, or the full sum was invested, or any dividends were declared, without placing the corporation under any pecuniary liability. Its pecuniary liability upon such regulation was inseparable from the conditions that were specified in the notice and could arise under those conditions only. If the regulation by the State were deferred until those conditions existed there was an incidental and contingent liability on the part of the corporation; otherwise there was none whatever. But the regulation of tolls and freights by the State was not dependent upon the circumstances, or the condition, or upon any act of the corporation. The State could regulate them whenever it chose to do so, and the corporation is not legally chargeable with any responsibility for the exercise or want of exercise of the legislative will, even if the considerations which influenced its exercise or want of exercise were reviewable by the courts.

All the provisions of section 22 and 23, including the pledge of the State that it would not reduce tolls and freights below
201 the minimum which was fixed therein, are, when construed with the latter clause of section 36, inconsistent with any theory of an irrepealable contract under numerous decisions of the Supreme Court of the United States. It held in Tomlinson *vs.* Jessup, 15 Wall. 454, 459, that such a reservation of the power to alter, amend or repeal the charter as is contained in section 36 "affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State;" and this case was affirmed and followed as late as the case of Charleston *vs.* Jessup, 154 U. S. 592, as well as in many intermediate cases, and its doctrine may be regarded as settled law. Railroad Co. *vs.* Maine, 96 U. S. 499; Water Co. *vs.* Clark, 143 U. S. 1; Railroad Co. *vs.* Bristol, 151 U. S. 156, and cases cited; Sinking Fund cases, *supra*.

Section 36 was repealed in 1848, and consequently there remained in section 23 an irrepealable contract with the State by which it bound itself that it would not reduce the tolls and freights below the mimimum fixed thereby, in these words: "But the corporation shall not be compelled by law to reduce the tolls and freights so

that a minimum of fifteen per centum per annum can not be made;" and that provision, in my opinion, is the only irrepealable contract concerning the regulation of tolls and freights in sections 22 and 23.

If therefore, my search for the legislative intent in these provisions of the charter were not restricted by the ruling and opinions of the superior court, I should find that the State did not irrevocable part with its power to make reasonable regulations concerning
202 tolls and freights for an indefinite or any period of time in the original charter; that by the repeal of section 36 in 1848 it made its minimum of regulation as designated in section 23 an irrepealable contract; and that with this exception there is not any irrepealable contract concerning the regulation of tolls and freights in the charter.

But as the superior court seems to have decided that there is such a special contract between the parties in the provisions of section 22 and 23, upon which the present action is maintainable, it becomes my duty to find and determine whether, upon that view of these provisions of the charter, the facts warrant a recovery. In the discharge of that duty it becomes necessary as a preliminary of such an investigation to ascertain what is meant by the words "full sum invested" in section 23. It was conceded upon the argument before me that these words are synonymous with the words the "capital employed," which are subsequently used in that section, and I think there can not be any serious doubt on that point. In other words, each of these phrases may be taken as a definition of the other; the "full sum invested" meaning the "capital employed," and the "capital employed" meaning the "full sum invested." In this view of these phrases the definitions of them which are furnished by the charter itself are exactly in accordance with both the legal and popular definitions of them. There ought not to be any controversy as to what is meant by the "full sum invested." The meaning of these words is as plain as human language can make it. The "full sum invested" is the whole investment by the corporation in its plant and property. It is impossible to make that phrase
203 mean anything else without the interpolation of other words. Additional light is thrown upon the meaning of that phrase by the subsequent phrase the "capital employed." The legal meaning of the word "capital" has been setteled in so many adjudications and is furnished by so many textbooks and dictionaries that it is impossible to cite all of them. In People *vs.* Commissioners, 23 N. Y. 192, 219, Chief Justice Comstock said: "The word 'capital' is unambiguous. It signifies the actual estate, whether in money or property, which is owned by an individual or a corporation. In reference to a corporation, it is the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the additions of all gains or profits realized in the use or investment of these sums; or, if losses have been incurred, then it is the residue after deducting such losses." All these definitions are briefly and accurately summarized in the work of a recent writer on the Law of Private Corporations, as follows: "The word capital when properly

used refers to the property of the corporation, while the capital stock represents the interests of the stockholders in the corporation. The amount of the capital stock is determined by the charter, and remains fixed except as increased or decreased in the manner provided by law, while the amount of capital which a corporation may acquire is limited only by its success in acquisition or accumulation." Elliott on the Law of Private Corporations, sec. 300; Christensen *vs.* Eno, 106 N. Y. 97; Bailey *vs.* Clark, 21 Wall. 284; Farrington *vs.* Tennessee, 95 U. S. 686: Wetherbee *vs.* Baker, 35 N. J. Eq. 501; People *vs.* Coleman, 126 N. Y. 423; International Life Assurance Society of London *vs.* Commissioners of Texas, 28 Barb. 318.

204 The popular and literary meaning of the word coincides with the legal meaning of it. In the Century Dictionary it is defined as "the wealth employed in carrying on a particular trade; stock in trade; the actual estate whether in money or property which is owned and employed by an individual, firm or corporation in business;" and the Century Dictionary adds that "as commonly used to indicate financial resources, it implies ownership and does not, without qualification, include borrowed money;" and it also adopts the definition of the word which I have quoted from the opinion of Chief Justice Comstock.

It is true that dividends are ordinarily declared on the nominal amount of capital stock, as urged by the State concerning the use of the words "dividend" and "divided" in section 23; but it is ordinarily presumable, where the amount of capital stock is unlimited, that the nominal amount of it will fairly and accurately represent the "full sum invested" or the "capital" employed, and it is reasonable to believe that the legislature meant that the State should not hold itself bound by the nominal amount of capital stock in any accounting with the corporation. If so, either of the parties would have the right to demand that the nominal amount of the capital stock should fairly and accurately represent the "full sum invested" or the "capital employed" as a basis for dividends in an accounting between them. But it is contended by the State that the contract means that only so much of the "full sum invested" by the corporation, or only so much of the "capital employed" by the corporation, as was directly contributed by the stockholders themselves, in their capacity as stockholders, to the funds of the corporation, should be taken into account. Such a con-

205 struction of the contract imposes a limitation upon its terms for which there is not any foundation in the contract itself, and it could be adopted only by reading into the contract words which it does not contain, or, in short, by the construction of another and a different contract between the parties. The stockholders were really the corporation and they had the right and power in these matters to do through their own instrumentality and their own agents what they might themselves have done directly, and it could be done just as legally and effectively in one way as in the other. But the contract was not between the State and the stockholders; it was a contract between the State and the corporation; the grant was

made to the corporation, and the consideration for it moved from the corporation; and the contract must be taken as having reference to all funds of the corporation which came from its stockholders, or were earned by it, and were invested by the corporation in its plant and property.

In behalf of this contention of the State it is urged that a strict construction of the provisions of the sections 23 should be adopted in favor of the State. Words and phrases in the charter can not be wrested from their legal and customary meaning by a strict construction of them, and a strict construction of them can not be invoked by the State in support of its present contention. A strict construction of particular provisions in a charter is required, as I have previously stated, in determining whether any special privileges and immunities have been granted, or any of the powers of sovereignty have been surrendered, or, in short, whether an irrepealable contract which involves the grant or
206 surrender of them by the State to the corporation has been made. But when an irrepealable contract has been once estalished, as it has been established by the ruling and opinions of the superior court, under the present view of the case, the time for a strict construction of those provisions in favor of the State has passed, and the parties are on precisely the same footing of complete equality as other parties who have entered into contractual relations.

The view of the charter which I have expressed is not only in accordance with the rule of statutory construction which has been prescribed by the legislature (1 Burns' R. S. 1894, sec. 240), but it also coincides with the manifest purpose of the legislature in the enactment of the charter. It was described in the title as an act to incorporate a railroad company. So far as the title of the charter is expressive of its purpose that was its sole purpose. It was certainly the primary and paramount purpose of the charter. All other purposes are subordinate to the main purpose of the charter and should not receive a construction which brings them into conflict therewith. The charter was not a legislative device for the creation of a common school fund. The corporation was not an instrumentality or agent of the State in levying a tax on the traveling and shipping public for the support of the common schools. It is hardly possible that the minds of the parties met on that view of the contract. Such a view of the charter is expressly contradicted by that provision of section 23 which proposes to reduce the tolls and freights of the corporation upon the contingency and within the limits
207 therein mentioned, which was a provision for the benefit of the traveling and shipping public instead of the common schools; and, as far as tolls and freights in excess of the amount to which they might and should have been reduced by the State were charged by the corporation, after its liability under the contract accrued, these earnings equitably belong to the traveling and shipping public, or that part of it furnished them, instead of the common schools.

The business of a railroad company is to build and conduct a railroad, and it requires a great deal of money to build and conduct one. There was but one railroad in the State when this charter was adopted, more than half a century ago. The State wanted more railroads and the corporation really became one of its instrumentalities and agents for the purpose of building a railroad across its territory. Building a railroad was an uncertain and hazardous enterprise. It was absolutely necessary that the corporation should have money, and the State intended that it should have as much money as was necessary for the purpose of its incorporation. The State wanted money for the construction and equipment of the railroad, more than it wanted any particular kind of money, or money from any particular source. It was not the policy of the State, or the purpose of the charter, to restrict investments in the plant or property, but it was their policy and purpose to encourage these investments on order that the corporation might develop its plant and property and adequately perform its duties to the public in every way.

The corporation was originally authorized by section 12 to build a railroad from "some point on the western line of the State"
208 eastwardly to the city of Richmond, and it was subsequently "released and discharged from the construction of any part of said road east of Indianapolis, by the act of January 20, 1851, and it was authorized by the act of February 16, 1848, "to commence operations at any point on said road." If there be anything in the contention that the railroad or any part of it should have been constructed eastwardly instead of westwardly from such a point, in literal compliance with the terms of the charter, it might have been available in a proceeding for the forfeiture of the charter, but it is not available in the present suit; and the same might be said concerning the time designated by the charter for the completion of the railroad, for that does not, in my opinion, form any part of the essence of the contract. Logan *vs.* Railroad Co. 90 Ind. 552; Railroad Co. *vs.* Clifford, 113 Ind. 460. But all further discussion of that point is rendered unnecessary by the amendment to the charter on March 6, 1865, which extended the time of construction for a period of seven years from that date. It is urged on behalf of the State that the railroad should be regarded as completed under the original charter on November 30, 1856, because it appears from the books of the corporation that the construction account was closed on that date and was not reopened until 1869. But there was not on that date a railroad between any point on the western line of the State and the city of Terre Haute as authorized by the charter, and the corporation had not been "released and discharged" by the legislature from the construction of that part of the railroad as in the case of that part of it east of the city of Indianapolis, and the railroad was not regarded by the legislature as
209 completed when the act of March 6, 1865, was passed, as conclusively appears from its express terms. As a matter of fact the railroad which was authorized by the charter

had not been completed on November 30, 1856, and the books and records of the corporation show that large sums of money were actually invested in the betterment of the railroad between that date and 1869.' The closing of the construction account did not work an estoppel which precludes the corporation from showing what the facts were, and the purpose of this inquiry is to ascertain the facts as they actually existed.

If the position of the State be correct there were really two railroads built under this charter; one of them being a railroad from Terre Haute to Indianapolis, and the other being a railroad from Terre Haute to a point on the western line of the State. It is my opinion that only one railroad, with its branches, was authorized by the charter; that the design and purpose of the legislature were that such railroad should extend from a point on the western line of the State to the city of Indianapolis; and that such railroad was not completed until these points were connected by it, and it was in full operation between them.

My next duty is to ascertain exactly upon the basis and in accordance with the legal and equitable principles which I have indicated the amount of the investment by the corporation in its plant and property.

The State introduced in evidence the books and official reports of the officers of the corporation, and these were practically all the evidence in the case. They do not contain any account between the corporation and the State, or any account of the "full sum invested" *eo nomine*. A court of equity is not bound by
210 the mode or form in which these books and the accounts in them are kept, any more than it is bound by the nominal amount of capital stock in ascertaining the "full sum invested." The nominal amount of capital stock may fairly represent the value of the plant and property of a railroad corporation without being indicative of the amount of money which has been actually invested in them. The value of the plant and property, and the full sum invested in them, are two different things, and while they may coincide there may be a great difference between them. A construction account is ordinarily an index of the amount of investment, but it is not conclusive. Operating expenses are not any part of an investment, but the fact that items of expenditure for the permanent improvement and betterment of a railroad have been charged as operating expenses does not change the real character of these items. As an admission by the corporation, it simply admits the fact that such an item has been charged and paid in that way, but it does not admit that the nature of the fact or item has been changed thereby. Where the nature of a fact is satisfactorily shown by entries on the books of the corporation I do not consider myself as precluded by the mode or form in which it is entered thereon from finding what its real nature is, and under what description it is properly classifiable; as it is the statement of an account of the full sum invested and not a mere transcription of the construction account of the corporation which is required of me.

It appears from these entries that large expenditures upon the plant and property of the corporation, amounting in the aggregate to the sum of $1,439,629.27, were made between 1856 and 1869 and
211 were charged as operating expenses. A portion of these expenditures was obviously required for renewals and repairs, and renewals and repairs are properly a part of operating expenses; while the difference between that portion of these expenditures and the whole of them is fairly chargeable as a part of the full sum invested. It sufficiently appears that the sum of $259,799.14, which is included in these expenditures, was for permanent improvements or betterments, and was an addition to the investment, as follows: In 1857, extention of depot at Indianapolis, $8,896.89; additional real estate, $836; two passenger coaches, $4,514.78. In 1860, freight cars, $5,459.08. In 1863, freight cars, $42,705.02; three locomotives, $37,343.50. In 1864, three passenger coaches, $10,930.33. In 1865, three locomotives, $43,455; three passenger coaches, $15,264. In 1868, freight cars, $71,877.16; one locomotive, $10,000; north branch, $8,517.38. And the total of $259,799.14 is included in my statement of the full sum invested. But the remainder of $1,179,830.13 has not been divided in that way on the books, and the books do not furnish any data for such division of it; and, as the burden is on the corporation to show what portion of these expenditures is an addition to the investment, and it has not done so, the whole amount of the remainder of these expenditures is excluded from the full sum invested and will be regarded as operating expenses in the present accounting, as they are charged in the accounts of the corporation.

The corporation has included in its account of the full sum invested an item of interest and discounts amounting to the sum of $149,577.58, and cites in support of its action in doing so the
212 case of Union Pacific R. R. Co. *vs.* United States, 99 U. S. 402, 422, 423, 424, which is not applicable to the precise question that arises upon the present item. The question concerning the present item is whether the cost of obtaining the money which was invested ought to be considered as a part of the investment. It is not a part of the investment under the definition of that word which I have adopted as a basis for the present accounting, and the item of $149,577.58 is therefore excluded from my statement of the full sum invested.

As the special contract was between the State and the corporation, it must be considered as having exclusive reference to the full sum invested by the corporation from its own funds. It does not include the sums invested by other parties who loaned money to the corporation upon its mortgage bonds, which was invested in the corporate property, until these sums were converted into shares of stock in the corporation, or paid by it and thereby became its own investment. While it is proper for a railroad corporation to include the money which is borrowed upon its mortgage bonds in its capital account, or what is essentially such an account, upon which all drafts for the construction and equipment of its railroad are made until it is opened for business, that is a rule of bookkeeping

which does not change the fact that borrowed money is the capital and investment of the lender instead of the borrower, and there is nothing in the contract which indicates that it meant capital and investment of both, or more than the capital and investment of the corporation only. It can hardly be supposed that in any settlement with the State under the contract the legislature intended

213 that the corporation should have ten per centum per annum on all borrowed money which was invested in the corporate property, in addition to the interest which it paid thereon.

The terms of the contract as they have been defined by me as a basis for my finding and report expressly reject that view of the contract. It appears from the evidence that the sums invested by the corporation in the construction of that part of the railroad between Terre Haute and a point on the western line of the State, in the years 1869, 1870, 1871, and 1872, amounting to the total sum of $819,163.19, were borrowed by it upon its mortgage bonds, and that item of expenditure is accordingly excluded from my statement of the full sum invested.

The contract requires that ten per centum per annum upon the full sum invested shall be added thereto. It has been urged upon me by the State that *interest* at the rate of ten per centum per annum is meant. An adoption of that view would require the interpolation of more words in the contract. It is unnecessary to depart from the plain latter of the contract in any way. By describing it as a contract for the payment of "interest," a fallacious analogy is substituted for the real contract itself, which is simply a contract for ten per centum per annum on the full sum invested. As an inference from that analogy the State contends that the rule of partial payments in the calculation of interest between a creditor and his debtor should be applied in taking this account. In my opinion the rule of partial payments is not required by the contract, and is inappli-able thereto.

In accordance with these views, I find and report that the

214 full sum invested with *pen* per centum per annum thereon upon the completion of the railroad and at the time when the corporation surrendered its special charter on January 17, 1873, was $4,663,638.50.

My next duty is to ascertain the aggregate amount of dividends that were declared or ought to have been declared, and whether it amounted to the full sum invested and ten per centum per annum thereon.

It is settled law that where the charter of a railroad corporation does not control the discretion of the directors in the declaration of dividends, their discretion in the absence of fraud or bad faith on their part, is not reviewable by the courts. The Supreme Court of the United States said in the case of The New York, Lake Erie and Western Railroad Co. *vs.* Nickals, 119 U. S., 296, 304, which was a suit by a stockholder for the recovery of dividends; "The directors of such corporations having opportunities, not ordinarily possessed by others, of knowing the resources and condition of the property

under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent, in any particular years, to declare a dividend upon stock. While their authority in respect to these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith on the part of the directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when, in good faith, believed to be necessary, for
215 the preservation or improvement of the property entrusted to its control." The provisions of section 24 concerning dividends do not limit the discretion of the directors in these respects. Under its provisions dividends were to be declared from "so much of the profits as the corporation may deem expedient," and "the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper." The broad discretion concerning the declaration of dividends which was committed to the corporation and its directors by the provisions of that section clearly includes the right to determine the amount of all dividends or whether any dividends should be declared or not. Their discretion was limited only by the requirement that dividends should not be made for a greater amount than the net profits after deducting all present and prospective expenses from them.

An equally clear and forcible statement of the rule of law concerning dividends was made by the Supreme Court of the United States in the case of Gibbons *vs.* Mahon, 136 U. S. 542, 558, which was a suit by a tenant for life against the trustee under a will to compel the transfer of shares of stock which had been apportioned as a dividend. It said concerning money earned by a corporation that "the corporation may treat it and deal with it either as profits of its business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve a part of the earnings of a prosperous year to make up for a possible lack of profits in a future year; or it may retain por-
216 tions of its earnings and allow them to accumulate and then invest them in its own works and plant, so as to secure and increase the permanent value of its property. Which of these courses shall be pursued is to be determined by the directors, with due regard for the company's property and affairs as a whole; and unless in case of fraud or bad faith on their part, their discretion in this respect can not be controlled by the courts." Beveridge *vs.* N. Y. Elevated R. R. Co., 112 N. Y. 1, 23; *In re* Kernochan, 104 N. Y. 618, 629; State of Maryland *vs.* B. & O. R. R. Co., 6 Gill, 363, 382; Williams *vs.* Western Union Tel. Co., 93 N. Y., 162, 192; Ely *vs.* Sprague, 1 Clark's Ch. 351, 355; Smith *vs.* Prattville Mfg. Co., 29 Ala. 503, 508; 2 Cook on Corporations, secs. 545, 684.

In the absence of fraud or bad faith these and other corporate transactions which are hereinafter mentioned are unimpeachable. They are not inhibited by the charter and they are legitimate in themselves. The complaint makes divers and sundry charges of actual and positive fraud against the corporation and its officers and directors. These charges are not sustained by the evidence. It does not appear from the evidence that the corporation either directly or indirectly misrepresented any facts to the State, or willfully concealed any facts from the State, or was guilty of any fraudulent acts or omissions which misled the State in any way.

If any of these corporate transactions are constructively fraudulent as against the State, it is on account of the relation between the parties and some breach of duty arising out of it. It was urged by the corporation that constructive fraud being a different head of equity from that which constitutes the gravamen of the complaint,
217 and there being a failure of proof under that issue, the suit ought not to be retained for an accounting on the ground that these transactions are constructively fraud-lent, and cited the cases of Jewett *vs.* Bowman, *et al.*, 29 N. J. Eq. 174, and Eyre *vs.* Potter, *et al.*, 15 How. 41, which were decided in jurisdictions where the distinction between legal and equitable procedure is maintained, and chancery precedents are closely followed, and are, in my opinion, inapplicable to the present action under our Indiana code. Various analogies have been suggested by the State as descriptive of the relation between the parties. The State has been alternately described as a partner, as a common stockholder and as a *cestui que trust*. These descriptions of the State imply that a fiduciary relation existed between the parties which imposed upon the corporation a higher degree of good faith and more stringent obligations in the disclosure of its affairs than otherwise would have been imposed upon it. But it is quite evident that if the aggregate amount of dividends never became equal to the full sum invested with ten per centum per annum thereon, there was never any such fiduciary relation between the parties. The legislature made the happening of that event a condition precedent to the existence of any such fiduciary relation, and the duties and obligations on the part of the corporation which grow out of it. Previous to that event they did not exist. They were wholly contingent upon the occur-ence of that event which may or may not have occur-ed. Until it occurred, the corporation was not charged with any special function or trust for the benefit of the State, or made a depositary, for the benefit of the State, of any special facts that
218 were otherwise inaccessible except as expressly stipulated in the charter itself. The charter expressly provided in section 23 that it should be "the duty of the corporation to furnish the legislature, *if required*, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same." As it was conceded upon the argument that the corporation was never required to furnish any

statement in accordance with the provisions of section 23 until shortly before the institution of the present suit as described in the complaint, and as it does not appear from the evidence that such requirement was prevented by the fraudulent acts or omissions of the corporation, it is not chargeable with any breach of duty under those provisions.

It was, of course, the natural and unavoidable result of some of these corporate transactions which were perfectly legitimate in themselves, to delay the contingency upon which the liability of the corporation to the State depended. But in the absence of any proof of actual or positive fraud on the part of the corporation, it cannot be held that the contingency was improperly delayed. A fraudulent intent on the part of the officers and directors of the corporation is not inferable from the mere fact that a delay of that contingency was one of the results of the proper discharge of their legitimate functions and duties. The presumption is in favor of the *bona fides* of their acts in this respect as well as in other respects, and it is supported by contemperaneous declarations in their official reports. Any delay of that sort was due to the very nature of
219 the contingency itself as it was fixed by the legislature and incorporated in the body of the contract.

The State contended upon the argument before me that it was the duty of the corporation to hasten and accelerate in every possible way the arrival of that contingency; to make it happen sooner than it would otherwise happen in the natural and ordinary course of events, and as much sooner as possible; and that in the performance of that duty it might have charged exorbitant tolls and freights and declared and paid enormous dividends which might have been immediately invested in the capital stock; and that it thereupon might have immediately increased the capital stock for the purpose of furnishing an opportunity for the investment of these dividends, etc. But I am wholly unable to discover either in the charter or elsewhere, any warrant of law for that contention, or the extraordinary devices which it seems to require. The terms of the contract do not impose any such duty on the corporation. They do not become operative as a contract until that contingency has arrived. Redman *vs.* Ætna Insurance Co., 49 Wis. 438. When the contract was made it included a grant for which there is special consideration as well as the general consideration of the public benefit. The special consideration for the grant is a conditional promise. The condition of that promise is that on the happening of an event which is described in the contract the corporation shall pay the State a sum of money. If that event never happens the corporation is not required to pay the State anything. The happening of that event is expressly made by the contract a condition precedent to the liability of the corporation on its promise. Until
220 that event happens there is not any contractual obligation on the part of corporation which is enforceable in a court of law or equity unless the condition has been rendered inoperative by the acts or words of the corporation. As the duty of hastening or

accelerating the time when the contract becomes operative must inevitably exist before that time arrives it is evident that such a duty could not have been imposed by the contract itself.

If the corporation is chargeable with such a duty in the present case it is chargeable therewith upon a theory which overthrows the whole contract. In urging that the corporation is chargeable with such a duty the State assumes that, under the contract, the happening of the event which is the condition of the promise by the corporation is dependent on its will and pleasure, and that the will and pleasure of the corporation are controlled by a duty which it owes the State independently of the contract. But if the happening of that event is susceptible of being advanced at the will and pleasure of the corporation, under the contract, it is equally susceptible of being delayed at the will and pleasure of the corporation; and if the condition of the promise is dependent on the will and pleasure of the promisor, it is a promise to pay a sum of money at its own will and pleasure, which is not a conditional promise or an effective promise of any sort; and the grant, which does not expire until the promise takes effect, would become perpetual as well as irrevocable.

If there was any duty which the corporation owed the State, independently of the special contract, it must have grown out of the general contract between the sovereign and its creature which,
221 according to Mr. Justice Story, in Dartmouth College *vs.* Woodward, *supra*, is "implied * * * on the part of the grantees, in consideration of the charter, that they will perform the duties and exercise the authorities conferred by it." But the present suit is not upon that contract and is not an appropriate remedy for a breach of duty under it. The proper remedy for any breach of duty under that general contract is a proceeding in the nature of a *quo warranto*, and the corporation is not collaterally assailable for such a breach of duty in the present suit which is upon the special contract only.

An incident of that contingency was the regulation of tolls and freights, and it is one of the charges in the complaint that these and other corporate acts were also for the fraudulent purpose of preventing such regulation. There is not any proof of that charge, and, on the contrary, it seems to me that there are some facts which form a part of the history of the times, and are within the judicial knowledge of the court, which are entirely inconsistent with the verity of that and other like charges. An examination of the statutes of Indiana immediately before and after, and at the time the special charter in this case was enacted, shows that there were numerous other special charters of like tenor and effect enacted by the legislature. Instead of realizing or endeavoring to realize anything for the common schools under the provisions of these charters, the legislature by a general act for the incorporation of railroad companies which was passed in 1852 and went into effect in 1853 and was quite as liberal in its terms as the special charters, furnished a full and free opportunity to the

corporations that had been organized under them to re-
222 lieve themselves of all pecuniary liability to the State for the benefit of the common schools by the mere abandonment of the special charters for the general charter. There never has been any regulation of tolls and freights by the State, and, since the adoption of our present constitution, a regulation of them could have been made only by a general law, and an exemption from such general regulation has therefore been practically worthless. If the contention of the State were adopted it would be necessary to hold that the corporation has been seeking to avoid by its fraudulent conduct a pecuniary liability for nearly three millions of dollars which it might have legally avoided in 1853 before any part of it accrued, or at any time since; and that it has resorted to such fraudulent conduct in order to retain a privilege which every other railroad corporation in the State has actually enjoyed for nothing. It does not appear that the corporation availed itself of its privilege by charging higher tolls and freights than other railroad corporations, even if it could have done so without a transgression of inexorable laws of trade and commerce that would have been injurious to its interests; or that it enjoyed any other benefits of its special exemption from a potential regulation of its tolls and freights than such as were enjoyed by every other railroad corporation in the State. My previous finding that there is a failure of proof under that portion of the complaint which charges the corporation with fraudulent acts or omissions for the purpose of delaying the contingency upon which its liability to the State depends, makes it unnecessary for me to enlarge any further upon these matters;
223 and I further find and report that the State has not shown any legal or equitable ground for interference by the court or its officer with the discretionary acts of the officers and directors of the corporation in the declaration of dividends, or in withholding them, or which would authorize a judicial revision of those acts.

It was held in Gibbons *vs.* Mahon, *supra*, upon an exhaustive review of English and American cases, that stock dividends are an accretion to the capital stock of a corporation and do not, like ordinary money dividends, form a part of the income of stockholders upon their shares of stock, and the corporation has urged upon me that this rule applies to the case under present consideration, and that in accordance therewith the stock dividends of $211,600 and $376,700 should not be included in the aggregate of dividends that were declared by it. But the rule between tenant for life and remainder man is inapplicable here. It does not make any difference, under the terms of the contract, whether a stock dividend is capital or income. The question is whether it was a dividend within the meaning of the contract. A dividend is primarily a sum which is divided, without reference to what the sum may represent. Ordinarily the division is an apportionment. Either capital or income may be apportioned among the stockholders of a corporation by the means of a dividend. It is quite possible that their holdings after a stock dividend had been declared in this case were not worth any

more than the value of them before it was declared. But it effected a transfer and appropriation of accretions of capital by the corporation to the stockholders on the basis of their previous hold-
224 ings, and within the limitations under which it might be held and owned by them individually, without the pecuniary equivalent that would have been required upon a mere increase of the capital stock. The stock dividends of $211,600 and $376,700 were therefore, dividends within the spirit as well as the letter of the contract, and are, accordingly, included by me in the aggregate of dividends that were declared by the corporation.

On the other hand, the State insisted that the sum of $117,137.48, which was paid by the corporation as a Federal tax on its dividends should be added to them and included in the aggregate of dividends on the ground that it was a liability of the stockholders which was paid by the corporation for them. But after several divided and conflicting opinions the Supreme Court of the United States unanimously held in Railroad Company *vs.* Collectors, etc., 100 U. S. 595, and held since in United States *vs.* Erie Railway Co., 106 U. S. 327, and Memphis & Charleston R. R. Co. *vs.* United States, 108 U. S. 228, that the Federal tax on the dividends of a corporation is a liability of the corporation itself and not a liability of its stockholders, and the amount of the Federal tax as aforesaid is accordingly excluded from the aggregate of dividends herein.

In accordance with these views I find and report that the aggregate amount of dividends which had been declared on the completion of the railroad and at the time when the corporation surrendered its special charter on January 17, 1873, was $4,341,274.98, and that the same did not then amount to the full sum invested with ten per centum per annum thereon; and I further find and report
225 that the aggregate amount of dividends declared by the corporation did not at any time between the date of the special charter and January 17, 1873, amount to the full sum invested with ten per centum per annum thereon, as more fully appears from the tables which are hereto annexed.

Another condition of the promise by the corporation was that it would pay such amount of surplus profits, "if any," as remained after reserving "such proportion as may be necessary for future contingencies." If a balance remained the State might recover it; if none remained there could not be a recovery by the State. The existence of such a balance is a condition precedent to the right of recovery. It is a part of the plaintiff's case to prove the happening of an event, or a state of circumstances, which is fixed by the contract as a condition precedent, and it is not excused from doing so by the mode in which the books of the corporation were kept. 1 Burns' R. S. 1894, sec. 373; Watson *vs.* Deeds, 3 Ind. App. 75; Johnson *vs.* Bucklen, 9 Ind. App. 154; Scouton *vs.* Eislord, 7 Johns. 36; Bush *vs.* Barnard, 8 Johns. 407. There is an entire failure of proof on that point. Evidence was introduced by the State to show that the corporation invested money in Government bonds; that it purchased stock in other corporations; that it purchased its own stock; that its

purchase of its own stock was made at an exorbitant price and for an illegitimate purpose; that stock was improperly issued; that stock dividends were illegally declared; that it made donations of money to the volunteer fund and an agricultural society. Some of these transactions were *ultra vires;* others were not. But as it does not appear that these transactions of the corporation were
226 had and done with the fraudulent purpose of evading a liability to the State, or preventing or delaying the contingency on which that liability depends; or that there is or has ever been any such privity of relation between the parties as would entitle the State to challenge those transactions of the corporation in the present suit; or that, if they were successfully challenged, it would change the result, a further consideration of them, or a finding thereon is deemed unnecessary.

On the hearing before me the corporation offered in evidence under its answer of former adjudication a certified transcript of the record and proceedings of the Owen circuit court and other items of proof which are mentioned in my report of the evidence, and they were excluded by me in accordance with the ruling and opinions of the superior court. In accordance therewith I refused to admit all the evidence of a former adjudication except such as is contained in a certified transcript of the record and proceedings of the superior court of Marion county in the suit of The State of Indiana, on the relation of the attorney general against The Terre Haute & Indianapolis Railroad Company, as the same appears in my report of the evidence, and on that evidence, I find as a fact and as a conclusion of law from the same that the judgment in that case is not a bar to the present suit.

As a conclusion of law from all the facts which I have found and reported herein, and upon the whole case, I find and report that the plaintiff is not entitled to recover from the defendant any sum whatever.

Respectfully submitted.

NOBLE C. BUTLER,
Special Master in Chancery.

Indianapolis, April 19, 1900.

227 TABLE I.

Statement of Full Sum Invested in Accordance with Finding and Report, without Addition of 10 *per Centum per Annum Thereon.*

Sum invested during 1847	$3,500.39
Sum invested during 1848	1,436.55
Sum invested during 1849	84,714.13
Sum invested during 1850	92,046.06
Sum invested during 1851	400,277.12
Sum invested during 1852	2,269.03
Sum invested during 1853	145,127.09
Sum invested during 1854	202,395.96

Sum invested during 1855	70,844.78
Sum invested during 1856	227,283.31
Sum invested during 1857	68,247.67
Sum invested during 1858	15,000.00
Sum invested during 1859	5,000.00
Sum invested during 1860	5,459.08
Sum invested during 1861	.....
Sum invested during 1862	65,000.00
Sum invested during 1863	153,048.52
Sum invested during 1864	14,930.33
Sum invested during 1865	86,719.00
Sum invested during 1866	55,000.00
Sum invested during 1867	.....
Sum invested during 1868	90,394.54
Sum invested during 1869	.....
Sum invested during 1870	.....
Sum invested during 1871	.....
Sum invested during 1872	.....
228 Sum invested during 1873	.....
Total	$1,788,693.56

229 TABLE II.

The dividends declared, including two stock dividends, were as follows:

1853	$51,004.73
1854	74,201.00
1855	93,645.00
1856	179,052.00
1856 stock dividend	211,600.00
1857	163,374.00
1858	137,645.00
1859	137,895.00
1860	138,145.00
1861	138,145.00
1862	170,054.00
1863	195,708.50
1864	307,876.50
1864 stock dividend	376,700.00
1865	230,898.00
1866	234,978.00
1867	277,641.00
1868	238,578.00
1869	238,578.00
1870	119,289.00
1871	357,867.00
1872	238,578.00
1873 one-eighth annual dividend	29,822.25
Total	$4,341,274.98

230 TABLE III.

The aggregate amount at the close of each year of the sums invested, together with ten per centum per annum thereon, and the aggregate amount at the close of each year of the dividends declared, are shown by the following table:

Year.	Sum invested plus 10 per cent. per annum thereon.	Year.	Aggregate amount of dividends declared.
1847	$3,500.39	1847	
1848	5,286.98	1848	
1849	90,494.80	1849	
1850	191,505.97	1850	
1851	609,952.80	1851	
1852	670,419.26	1852	
1853	873,970.68	1853	$51,004.73
1854	1,149,303.68	1854	125,205.73
1855	1,313,325.09	1855	218,850.73
1856	1,632,514.42	1856	609,502.73
1857	1,823,751.53	1857	772,876.73
1858	1,968,565.74	1858	910,521.73
1859	2,104,879.95	1859	1,048,416.73
1860	2,242,153.24	1860	1,186,561.73
1861	2,374,513.35	1861	1,324,706.73
1862	2,571,873.48	1862	1,494,760.73
1863	2,863,782.12	1863	1,690,469.23
1864	3,032,877.42	1864	2,375,045.73
1865	3,275,254.42	1865	2,605,943.73
1866	3,494.584.32	1866	2,840,921.73
1867	3,664,414.22	1867	3,118,562.73
1868	3,924,638.66	1868	3.357,140.73
1869	4,103,508.02	1869	3,595,718.73
1870	4,282,377.38	1870	3,715,007.73
1871	4,461,246.74	1871	4,072,874.73
1872	4,640,116.10	1872	4,311,452.73
1873	4,663,638.50	1873	4,341,274.98

232 And afterwards, to wit: on the 5th day of May, 1900, being the 30th judicial day of the April term, 1900, of said court, before the same hon. judge, the following proceeding was had herein, viz:

"Comes the plaintiff by counsel, and files its exceptions to the report of the master commissioner herein in these words and figures, viz:

(These exceptions are set forth in the bill of exceptions hereafter appearing in this transcript.)

And afterwards, to-wit: on the 2d day of June, 1900, being the 24th judicial day of the May term, 1900, of said court, before the same hon. judge, the following proceeding was had herein, viz:

"Comes the defendant by counsel, and files its exceptions to the report of the master commissioner herein in the words and figures following, viz:

(These exceptions are set forth in the bill of exceptions hereafter appearing in this transcript.)

233 And afterwards to wit: on the 27th day of October, 1900, being the 24th judicial day of the October term 1900 of said court, before the same hon. judge, the following proceedings were had herein, viz:

"Comes now the parties by counsel, and this cause, being at issue, is submitted to the court for final hearing, determination, adjudication and decree upon the report of Noble C. Butler, special master herein and upon the evidence taken and reported by said special master and returned by him with his said report as part thereof, and upon the exceptions filed to said special master's report by the parties hereto, respectively.

And the court, being fully advised in the premises now delivers its opinion and decision in writing, which on motion of the plaintiff is ordered to be filed and made a part of the record in said cause, and is as follows, viz:

234 STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Superior Court.

THE STATE OF INDIANA on the Relation of WILLIAM A. Ketcham, Attorney General,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMpany. } No. 54555.

This case was referred to Noble C. Butler, master in chancery and such master was authorized to find and report the facts under the issues joined and to report his conclusions thereon.

The master heard the evidence and has filed a report of his findings and conclusions and has accompanied therewith a transcript of the evidence introduced before him.

The plaintiff has filed thirty-eight specific exceptions to said report and the defendant eleven.

A hearing on said exceptions has been had both by oral argument and printed briefs.

The exceptions filed by the State embrace objections on the ground of irrelevancy and immateriality of matters embodied in the report; errors in the facts found, ommissions of others which it is claimed were proved and ought to have been found and errors in the conclusions on the facts found.

The exceptions filed by the defendant are upon the ground of error in the finding of facts and the conclusions on those
235 found, and error in the exclusion of certain testimony offered.

In considering these several exceptions I shall not attempt to review them severrally and separately, as many of them are so combined and connected as to reqaire them to be considered together.

When the case was considered on the demurrer to the complaint, the three judges sitting in the cause, such a construction was given of the defendant's charter as to hold, that by the acceptance of the charter, there was a contract created between the State and the defendant by which upon the payment to the stockholders of a stipulated sum, either from dividends declared, or which the court might find, if the facts warrantad ought in good faith to have been declared, the State would be entitled to share in the surplus profits of the corporation, and that regulation of toll and freights by the State was not one of the conditions precedent to the State's right to participate.

Considerable space was occupied in the master's report and much discussion was had in the argument on the questions as to whether the charter contained an irrevocable contract by which the State had foregone its right to regulate tolls and freights before the time should arrive when the State would be entitled to share *and* profits.

This discussion seems to be on the theory that unless the State's promise to abstain from regulation of tolls were an irrevocable one, there would be no consideration to support the defendant's promise to pay over a portion of the profits.

I think it wholly immaterial as to whether the promise was an irrevocable one or not.

236 The mere fact of the granting of a charter at all and which was accepted by the defendant was a sufficient consideration for any promise on the part of the corporation contained therein; and further, after the State has fully performed its part of the agreement, although such performance may have been optionary, the obligation on the part of the corporation becomes fixed and absolute.

I still adhere to the view expressed in the ruling on demurrer that there was a valid contract between the State and the defendant

by which, when a sum equal to the full sum invested and ten per cent. per annum thereon should be paid to the stockholders the State should hereafter be entitled to the surplus profits over 15 % per annum to the stockholders and such sum as it might be necessary to reserve for future contingencies.

In order to determine when the State right shall mature, and as the foundation on which to build the computation it is necessary to ascertain what was the full sum invested within the meaning of the charter.

The State contends that by the term "full sum invested" is meant the actual amount contributed by the stockholders in building the road and which it contends was the sum of $1,216,690.05, while the defendant contends that the full sum expended by it from whatever source, in building and equiping the road, that is, the total cost of building the road is to be taken as the "full sum invested," and it claims said amount to be $2,807,313.79.

The master in his report takes the view that by the words "full sum invested" is meant the sum invested by the corporation
237 from its own funds, other than the proceeds of loans, and he fixes the sum at $1,788,693.56.

If the defendant's contention as to what is meant by the full sum invested be the true one, then neither the dividends declared nor the net total earnings amounted to the full sum invested with the ten per cent. per annum thereon, at any time prior to the 17th day of January, 1873, the date on which the defendant accepted the benefits of the general railroad law and ceased to operate under its charter, and there would be nothing due the State.

If the sum fixed by the master as the full sum invested be the correct one, then upon the rule of computation adopted by him there would be nothing due the State, if the sum contended for by the State be taken as the full sum invested then even upon the rule of computation adopted by the master a very considerable sum would be found due.

And upon the rule contended for by the State a much larger sum would be due.

The solution of this question, that is, as to what is meant by the term "full sum invested" lies at the very thresh*h*old of the case and on its solution, depends the importance or non-importance of most of the other questions involved.

I find myself wholly unable to agree with the master in the conclusion at which he arrived, while there may be some force in the suggestion of the master that to hold that the investment intended is that of the stockholders, would require the interpolation of other words and terms than those found in the charter; on the other hand, to arrive at the conclusion reached by the master, that the
238 investment referred to was that of the corporation itself, would also require the interpolation of still other words and terms.

If additional words and terms may not be supplied in the one case they may not in the other.

I do not however think it necessary in this case to supply any word or terms to arrive at the legislative intent.

The charter being silent as to whose investment was intended, it is for the court under the rules of construction to ascertain that intent, if possible and without doing violence to any of the words and terms actually employed.

In performing this duty the court may look to the history of the times, the policy of the State at the time, the object to be accomplished, the situation of the parties involved by the legislation.

It is clear that at the time of the enactment of this charter it was in the mind of the legislature that the stockholders should subscribe and furnish the entire capital to construct the road.

This is apparently the fact that by section 56 it was provided that if the directors shall contract any debts over and above the amount of good and solvent stock subscribed they should be individually liable for such excess.

And the further provision in section 31 whereby in case the capital authorized should prove insufficient to accomplish the intended work, authority is given to increase the amount of said capital stock.

There was no other source provided or contemplated at the time the charter was enacted from which the funds to construct
239 the road should be realized, except from donations, gifts and bequests.

It was the manifest purpose of the State to limit the profits which should accrue to the stockholders and yet make the inducements sufficiently liberal so as to induce persons to furnish the money with which to build the road.

To accomplish this result by section 24, the corporation was required to make semi-annual dividends to the stockholders of so much of the profits as the corporation might deem expedient, and by section 23 it was provided that when the aggregate amount of the dividends declared should amount to the full sum invested and ten per cent. thereon, the State should be entitled to share in profits &c.

The term " dividends declared " means dividends to stockholders just as certainly as though the words " to stockholders " were actually written in the charter following the word dividends, and the term " full sum invested " can refer only to the sum to be invested by the persons whose investment was then under consideration and this, as I have already indicated, was the amounts to be subscribed by the shareholders, I exclude as unreasonable and strained the conclusion that the legislature meant to return to the stockholders his principal with 10 % thereon, and also in addition to turn over to him a sum equal to all of the gifts, donations and bequests that might have come to the corporation from others with 10 % per annum thereon.

I think it equally unreasonable and strained to hold that the stockholders were to have in addition a sum equal to all earnings

that may have been used in constructing the road with 10 %
240 thereon and that both donations and earnings should become to the stockholders a principal or investment on which he should be entitled to 15 % per annum for all future time.

Taking into consideration the manifest purpose to be accomplished I think it clear that by the terms "full sum invested" the legislature intended and meant the sum invested by the stockholders in building the road.

It appears from the evidence that the actual amount contributed by the stockholders for stock and for bonds afterwards converted into stock was the sum of $1,216,690.05.

There were certain discounts allowed to stockholders on payments for stock and in payment for bonds which were afterwards converted into stock amounting to the sum of $149,577.58, this sum the defendant contends should be added to the actual sum paid and treated as a part of the sum invested and while it is true that certificates of stock were issued covering a portion of this sum, yet it was not the face value of the stock which was to be taken as the sum to be returned in dividends but the actual sum invested.

The master excluded this amount in computing the "full sum invested" and this conclusion I think was right.

The State contends that in computing the full sum invested and ten per cent. thereon, the rule in regard to computing interest between debtor and creditor where there have been partial payments, should be applied.

The master rejected this view and held that the ten per cent. was to be computed annually upon the gross sum and that the State would not be entitled to participate until the dividends paid
241 should amount to a sum in excess of the annual 10% dividend equal to the sum invested.

In this I think the ruling of the master is correct.

Section 23, as originally enacted, fixed the aggregate sum, to which dividends should accumulate before the State should be entitled to share.

It was not to be a refunding or repayment of the principal but a payment of dividends on that principal as profit, and when the dividends in excess of the ten per cent. annually should accumulate to a sum equal to the principal, then the stockholder's future dividends were limited to 15% on his principal and the surplus was to go to the State.

In computing the amount of dividends declared by the corporation, the master includes a stock dividend in the year 1856 of $211,600.00, and another in the year 1864 of $376,700.00.

These dividends represent expenditures by the corporation for betterments or improvements of the road and equipment and which were paid out of the earnings.

The corporation had a right to use its earnings in improving its road or adding to its equipment and as between it and the stockholders, it might issue to the stockholders a stock dividend representing such betterments but as against the State it had no right to

capitalize such earnings and hereby make them an investment on which the stockholder might be entitled to receive the 10% and the 15% dividends nor has the State the right to use such dividends in swelling the amount of dividends declared and thereby hasten the arrival of the time when it would be entitled to share in the
242 profits, as between the corporation and the State.

These expenditures should be treated just as other operating expenses and when paid should disappear just as other disbursements.

There was a Federal tax on dividends amounting to the sum of $117,137.48.

The United States statute under which this tax was paid, provided that the tax should be charged to the stockholders, but should be retained out of his dividend by the corporation and by it paid over to the Government.

It was so treated in this case.

The master however, excluded this sum from the aggregate amount of dividends declared basing his action upon a ruling of the Supreme Court of the United States in

100 U. S. 595,
106 U. S. 327
108 U. S. 228

The Supreme Court in previous decision, 17 Wall. 322 where the dividends as here were paid to residents in the United States held the opposite view, that the tax was a tax upon the creditor and not upon the corporation.

In the later cases cited by the master two of them were cases where the dividends were paid to non-resident aliens, on whom Congress could not levy a tax, and in the other case the dividend was earned and paid within the Confederate lines where the situs of the railroad was within the military possession of the United States.

243 In neither case was the former case overruled nor the principal discussed at any length, and in this state of the decisions I think it better to follow the clear language of the statute and the clear reasoning of the case in 17 Wall. 322, and hold that the said sum of $117,137.48 should be included in the dividends declared.

The State contends that the revenues instead of dividends declared should be applied each year to the accumulation of a sum which should be equal to the full sum invested and ten per cent. thereon.

The statute is very explicit that this sum shall be accumulated from the dividends declared and the amount of dividends to be declared is left to the discretion of the board of directors as is also the sum which may be retained as a contingent fund to meet subsequent expenses.

The charter does not attempt to limit the sum that may be retained but this power is expressly left to the directors, and unless

fraud or bad faith be shown the action of the directors in this matter can not be controlled by the courts.

The master has found as a fact that the evidence does not establish fraud or bad faith on the part of the directors.

The State while not contending that actual fraud has been shown, claims that when earnings are shown to have been made, that unless a necessity be shown for retaining a portion as a contingent fund, that it became the duty of the directors to apply the entire net revenues as dividends, and that a failure to do so is constructive fraud.

244 This construction as to the defendant's duty may be correct as applied to section 23, but that section has no application to the dividends that shall be made prior to the arrival of the time when the State shall participate in the profits, but has reference only to the disposition of profits after the arrival of that period and when that period arrives, the amount of the dividend is fixed at 15%, and the sum to be reserved is no longer a matter in the discretion of the directors, but is a fact to be found by the directors, and that fact is the fact of neceaaity, and if the directors should reserve a sum in excess of any possible necessity the courts might interpose in the matter.

Prior to the arrival of the time when the State shall participate the amount of the dividend and the sum to be retained rests wholly in the discretion of the directors and that discretion can only be reviewed by the courts in case of fraud or bad faith.

It appears from the evidence that in every year from 1852 to 1873 the corporation has a surplus of earnings after paying all expenses and the dividends which were declared, and said surplus at the end of 1869 amounted to the sum of $1,049,365.03.

In the years 1869, 1870, 1871, and 1872 the defendant built the extention from Terre Haute west to the State line and for that purpose and for betterments side tracts *and* etc. it expended $819,163.79.

The corporation had a right to use this surplus in building said extention and although it borrowed $800,000 with which to make said improvements, yet in any accounting with the State I

345 think it would have a right to set off against said mortgage indebtedness a like sum of said surplus.

If we deduct from said surplus of $1,049,365.03 the cost of the extention to the State line and the other expenditures for betterments, sidings &c. $819,163.79. There would still remain of said surplus the sum of $230,201.24.

And this sum considering the magnitude of the defendant's financial transaction is not so large as to warrent the conclusion that the defendant was acting in bad faith in retaining it.

It is further argued on the part of the State that the defendant was guilty of bad faith in that it invested a large portion of its surplus in the United States bonds, the bonds and stock of other corporations, and in its own stock at a price in excess of its value.

If the corporation might accumulate a surplus at all then I do

not see that there would be any impropriety of investing that surplus or a portion of it in income bearing investments.

It would be better to do so than to let it lie idle and in this case the State has no right to complain for the evidence shows that a very considerable portion of the earnings which the State is claiming the right to recover were received as income from those investments of the surplus.

More than $200,000.00 was received by the defendant from dividends on its own stock and went to swell the earnings of the corporation.

I therefore think the master was warranted in finding that the evidence did not make a case of fraud and that his conclu-
246 sion that the dividends declared only can be used in computing the sum which shall be equal to the full sum invested and ten per cent. per annum thereon.

Upon the basis that the investment by the stockholders is to be taken as the full sum invested then it will be found that at the end of the year 1869, or on January 1st, 1870, the cash dividends declared will exceed the full sum invested and 10 per cent. per annum thereon by a considerable sum; and it also appears that for each year after 1869 there was a large amount of net earnings after paying all expenses and charges it follows that the surplus hereinbefore named, to-wit: $230,201,24 still remained a surplus on the 17th day of January 1873, when the defendant accepted the general railroad law of the State and ceased to operate under its charter and the question then arises as to what shall be done with this surplus in the final accounting.

The State contends that when the defendant accepted the general law, the State thereby was deprived of any interest in the future operation of the company, and that the corporation would have no right to retain this surplus to be used in operations in which the State would have no interest and that the accounting should be upon the same basis as if the corporation had been dissolved and was no longer to operate a railroad.

There is no evidence that this sum was ever set aside as a contingent fund, but it is simply held as surplus profits, and under those circumstances I think it should be accounted for to the State.

247 The State also contends that the State and county taxes paid by the defendant amounting to the sum of $197,747.55 should be added to the net earnings.

I do not see any solid grounds on which this claim can be sustained, but in my opinion the taxes should be treated as an expense.

If I am right that only dividends declared can be resorted to in computing the sum equal to the full sum invested and ten per cent. thereon then this question ceases to have any importance prior to the year 1869.

In what has already been said the defendant's exceptions have all

been covered except those referring to the exclusion of evidence in support of the answer of former adjudication.

While it would have been proper to have admitted the offered evidence in order that it might be in the record, yet if the evidence, when considered, did not or would not prove the answer, then the error was harmless.

In ruling upon the demurrer in this case this court held when these facts were especially pleaded that they did not amount to an adjudication and inasmuch then as the evidence, if it had been admitted did not sustain the plea, the error, if error it was, was harmless.

The rule that it may be shown by oral evidence or evidence outside of the record as to the question decided, will not apply when the judgment is based on an order sustaining a demurrer to the complaint. This seems to be an exception to the rule.

In accordance with the views expressed, I think the plain-
248 tiff's exceptions numbered 3, 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 34, and 37 should be sustained.

And the exceptions numbered 1, 2, 4, 8, 12, 14, 15, 25, 32, 33, 35, 36, and 38, should be overruled.

And also that the exceptions filed by defendant numbered 4 and 5 should be sustained and that exceptions numbered 1, 2, 3, 6, 7, 8, 9, 10 and 11 be overruled.

And that the account should be re-stated between the parties in the manner following, to-wit:

249 *Table Showing Investment by Stockholders by Years, 10 % per Annum Thereon, and Dividends Declared.*

Year.	Investment.	10 % thereon.	Dividends declared.
1847.....	2,411.00		
1848.....	5,185.00	241.10	
	7,596.00		
1849.....	51,990.00	759.60	
	59,586.00		
1850.....	148,428.71	5,958.60	
	208,014.71		
1851.....	173,465.81	20,801.47	
	381,480.52		

Table Showing Investment by Stockholders by Years, 10 % per Annum Thereon, and Dividends Declared—Continued.

Year.	Investment.	10 % thereon.	Dividends declared.
1852.....	225,509.81	38,148.05	
1853.....	606,990.33 63,642.14	60,699.03	51,004.73
1854.....	670,632.47 168,568.80	67,063.24	74,201.00
1855.....	839,201.27 47,031.97	83,920.12	93,645.00
1856 11 mo.....	886,233.24 108,319.77	11 mo. 81,238.05	179,052.00
1857.....	994,553.01 48,174.30	to Nov. 30 99.455.30	163,374.00
250 1858.....	1,042,727.31 13,381.75	104,272.73	137,645.00
1859.....	1,056,109.06 4,460.58	105,610.90	137,895.00
1860.....	1,060,569.64	106,056.96	138,145.00
1861.....	No investment	106,056.96	138,145.00
1862.....	52,634.88	106,056.96	173,169.69
1863.	1,113,204.52 68,692.98	111,320.45	201,761.32
1864.....	1,181,897.50 5,352.70	118,189.75	335,646.09
1865.....	1,187,250.20 24,979.27	118,725.02	243,050.52
	1,212,229.47		

Table Showing Investment by Stockholders by Years, 10 % per Annum Thereon, and Dividends Declared—Continued.

Year.	Investment.	10 % thereon.	Dividends declared.
1866	4,460.58	121,222.94	247,345.23
	1,216,690.05		
1867		121,669.00	292,253.70
1868		Nov. 30 1868 121,669.00	251,134.70
1869		Dec. 31, 1869 131,808.08	251,134.70
	1,830,943.31	1,830,943.31	3,108,602.68
	3,047,633.36		3,047,633.36
Excess of dividends over investment & 10 %			60,969.32

January 1, 1870.

251 Add to this excess the total earnings for the year 1870	278,720.54
Add net earnings for 1871	336,988.96
Add net earnings for 1872, Nov 30	296,589.00
Add net total earnings from Dec. 1st 1872 to Jan. 17, 1873	103,403.26
Add surplus profits remaining since Dec. 31st 1869	230,201.24
Total	1,306,872.32
Deduct 15 % on full sum invested (1,216,690.05) from Jan. 1, 1870, to Jan. 17, 1873	556,128.88
Balance due State January 17, 1873	750,743.44
To which sum there should be added interest at six per cent. per annum from March 13, 1897 the date on which demand was made to the date of judgment—amounting to	163,161.57
Total	913,905.01

252 Thereupon in accordance with said opinion, it is ordered that the exceptions taken by the plaintiff to said report, numbered 3, 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 34, and 37 be sustained.

To the sustaining of each one of said exceptions the defendant at the time excepted, separately and severally, and 120 days are now allowed to the defendant within which to present to the judge of this court its proper bill of exceptions, covering the rulings of said exceptions.

And it is likewise ordered that the exceptions taken by the plaintiff to said master's report numbered 1, 2, 4, 8, 12, 14, 15, 25, 32, 33, 35, 36, and 38 be overruled, and to the overruling of each one of these exceptions the plaintiff herein, at the time, excepted separately and severally and 120 days are now allowed the plaintiff within which to present to the judge of this court its proper bill of exceptions herein covering the rulings on said exceptions.

And it is likewise ordered that the exceptions taken by the defendant to said report numbered 4 and 5 be sustained, and to the sustaining if each of said exceptions the plaintiff herein, at the time, excepted separately and severally and 120 days are now allowed the plaintiff within which to present to the judge of this court the proper bill of exceptions herein covering the rulings on said exceptions.

And it is now likewise ordered that the exceptions of the defendant herein to said master's report numbered 1, 2, 3, 6, 7, 8, 9, 10, and 11 be overruled, and to the overruling of each one of said
253 exceptions the defendant herein, at the time, excepted separately and severally, and 120 days are now allowed the defendant within which to present to the judge of this court its proper bill of exceptions herein covering the rulings on said exceptions.

And thereupon the court finds for the plaintiff and assesses its damage at the sum of nine hundred and thirteen thousand nine hundred and five dollars and one cent. (913,905.01)

And the defendant now files its motion for a new trial herein with its reason- therefore, in the words and figures following:, to-wit:

STATE OF INDIANA, } ss:
Marion County, }

Superior Court.

STATE OF INDIANA *ex Rel.* WILLIAM A. Ketcham, Attorney General,
vs.
THE TERRE HAUTE AND INDIANAPOLIS Railroad Company.

No. 54555. Defendant's Motion and Reason- for a New Trial.

The Terre Haute and Indianapolis Railroad Company, defendant in the above entitled cause, moves the court for a new trial herein for the following reasons, to-wit:

254 First. The court erred in overruling each one of the following exceptions filed by the defendant herein to the report of Noble C. Butler, special master herein, to-wit:

Exceptions numbered 1, 2, 3, 6, 7, 8, 9, 10 and 11.

Second. The court erred in sustaining each one of the following exceptions filed by the plaintiff herein to the report of Noble C. Butler, special master herein, to-wit:

Exceptions numbered 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 34, and 37.

Third. The decision of the court is not sustained by sufficient evidence.

Fourth. The decision of the court is contrary to law.

Fifth. The assessment of the amount of recovery is too large.

Sixth. The court erred in referring the above entitled cause to a master for hearing and report.

S. O. PICKENS,
LAWRENCE MAXWELL, JR.,
Attorneys for Defendant.

JOHN G. WILLIAMS, *Of Counsel.*

And the court having duly considered the same and being fully advised in the premises, it is ordered that said motion for a new trial be and the same is now overruled, and to this ruling and action of the court, the defendant herein, at the time, excepted and

255 120 days are now allowed the defendant within which to present to the judge of this court its proper bill of exceptions, herein.

It is now ordered, adjudged and decreed by the court that the plaintiff herein do have and recover of the defendant herein the said sum of nine hundred and thirteen thousand nine hundred and five dollars and one cent, ($913,905.01) its damages so assessed as aforesaid together with its cost in this behalf expended taxed at $— to which judgement order and decree the said plaintiff and the said defendant, each of them, separately and severally at the time excepts.

VINSON CARTER, *Judge.*

And afterwards to-wit: on the 31st day of October 1900, being the 27th judicial day of the October term, 1900, of said court, before the same hon. judge, the following proceedings were had herein —viz:

256 "Come now the parties by counsel and the plaintiff files its first motion to amend and modify the said judgment and decree herein, in the words and figures following:

(Hereafter inserted in plaintiff's third bill of exceptions filed this day, which see.)

"And the court being fully advised in the premises overrules said motion, to which ruling said plaintiff, at the time excepts and ten days' time is allowed it within which to prepare and file its bill of exceptions upon such ruling.

And hereafter on the same day, the plaintiff comes and files its second motion to modify the said judgment and decree herein in the words and figures following:

(See next page.)

257 (Hereafter inserted in plaintiff's third bill of exceptions filed this day which see.)

And the court having seen and examined said motion and being fully advised in the premises, does now overrule the same, to which ruling the plaintiff, at the time excepts, and ten days' time is allowed it within which to prepare and file its bill of exceptions upon such ruling.

And hereafter on the same day the plaintiff files its third motion to amend and modify said judgment and decree herein, in the words and figures following, to-wit:

(Hereafter inserted in plaintiff's third bill of exceptions, filed this day, which see.)

258 And the court being advised in the premises, does now overrule said motion, to which ruling said plaintiff, at the time excepts, and ten days' time is allowed it within which to prepare and file its bill of exceptions upon such ruling.

And thereafter on the same day the plaintiff files its fourth motion to amend and modify said judgment and decree herein in the words and figures following, to-wit:

(Hereafter inserted in plaintiff's third bill of exceptions filed this day, which see.)

259–270 "And the court having seen and examined said motion and being advised in the premises, does now overrule the same, to which ruling and action by the court said plaintiff, at the time excepts, and ten days' time is allowed it within which to prepare and file its bill of exceptions upon such ruling.

And now on this same day the plaintiff comes and tenders this its third bill of exceptions upon said rulings and each of them, by said court, upon said several motions to amend and modify the said judgment and decree, separately and severally; and the court having examined said bill of exceptions does now allow the same, and thereupon said bill of exceptions is signed by the judge, filed and made a part of the record in this cause.

The said bill of exceptions being in the words and figures following, to-wit:

* * * * * * * *

271 And thereupon the plaintiff now files its motion and written reasons for a new trial herein in the words and figures following, to-wit:

STATE *ex Rel.*, &c.,
vs.
THE TERRE HAUTE AND INDIANAPOLIS Railroad Company.

No. 54555. Plaintiff's Motion for a New Trial.

Plaintiff moves the court to set aside the decision and judgment herein and grant it a new trial and in support of said motion now assigns the following reasons therefore, to-wit:

First. That the decision is not sustained by sufficient evidence.

Second. That the decision is contrary to law.

Third. That there was error in the assessment of the amount of recovery, the same being too small, the action being upon a contract.

Fourth. That, there was error of law occur-ing at the trial and excepted to by the plaintiff at the time in this.

A. That the court erred in overruling the first exception filed by the plaintiff to the report of the special master.

B. That the court erred in overruling the second ex-
273 ception filed by the plaintiff to the report of the special master.

C. That the court erred in overruling the fourth exception filed by the plaintiff to the report of the special master.

D. That the court erred in overruling the eighth exception filed by the plaintiff to the report of the special master.

E. That the court erred in overruling the twelfth exception filed by the plaintiff to the report of the special master.

F. That the court erred in overruling the fourteenth exception filed by the plaintiff to the report of the special master.

G. That the court erred in overruling the fifteenth exception filed by the plaintiff to the report of the special master.

H. That the court erred in overruling the twenty-fifth exception filed by the plaintiff to the report of the special master.

I. That the court erred in overruling the thirty-second exception filed by the plaintiff to the report of the special master.

274 K. That the court erred in overruling the thirty-third exception filed by the plaintiff to the report of the special master.

L. That the court erred in overruling the thirty-fifth exception filed by the plaintiff to the report of the special master.

M. That the court erred in overruling the thirty-sixth exception filed by the plaintiff to the report of the special master.

N. That the court erred in overruling the thirty-eighth exception filed by the plaintiff to the report of the special master.

O. That the court erred in sustaining the fourth exception filed by the defendant to the report of the special master.

P. That the court erred in sustaining the fifth exception filed by the defendant to the report of the special master.

Q. That the court erred in overruling the first motion filed by the plaintiff to modify the judgment and decree.

R. That the court erred in overruling the second motion filed by the plaintiff to modify the judgment and decree.

S. That the court erred in overruling the third motion filed by the plaintiff to modify the judgment and decree.

275–279 T. That the court erred in overruling the fourth motion filed by the plaintiff to modify the judgment and decree.

WILLIAM A. KETCHAM,
Special Counsel for State.

R. O. HAWKINS,
R. S. TAYLOR,
FERDINAND WINTER,
CLARENCE WINTER,
Of Counsel.

And the court being sufficiently advised in the premises, does now overrule the plaintiff's motion for a new trial herein, to which ruling and action by the court said plaintiff, at the time excepts and one hundred and twenty days' time is allowed it within which to prepare and file its bill of exceptions upon such ruling.

And afterwards to-wit: on the 2nd day of November, 1900, being the 29th judicial day of the October term 1900, of said court, before the same hon. judge, the following proceedings were had herein, viz:

Comes now Noble C. Butler, special master in chancery and files his application for an allowance as follows, viz:

280 And afterwards to-wit: on the 20th day of February 1901, being the 15th judicial day of the February term 1901, of said court before the same honorable judge, the following proceedings were had herein:

STATE OF INDIANA *ex Rel.*
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

Comes defendant and presents its general bill of exceptions and time is now taken by the court to consider the same.

And afterwards to-wit: on the same day last above mentioned, being the 20th day of February, 1901, and the 15th judicial day of the February term, 1901, of said court, before the same honorable judge, the following proceedings were had herein:

STATE OF INDIANA *ex Rel.*
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } 54555.

281 And now again comes the parties by counsel, and the court having considered the bill of exceptions No. 3, heretofore this day tendered by the defendant the said bill of exceptions is now signed by the judge of this court and the same is now filed and made part of the record herein, and the same is in the words and figures following, to wit:

282-338 STATE OF INDIANA, }
Marion County. }

Superior Court, Room 3.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General,
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

Defendant's Bill of Exceptions No. 3.

Be it remembered that on the 19th day of April, A. D. 1900, Mr. Noble C. Butler, to whom, by an order of this court herein made and entered on the 1st day of July, A. D. 1899, the above entitled cause was referred as master to hear and report the evidence, together with his findings of fact and conclusions of law thereon, filed in open court the following report, to-wit:

339 STATE OF INDIANA *ex Rel.*, etc.,
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } No. 54555. R. 3.

Exceptions of Plaintiff to the Report of the Special Master in Chancery.

The plaintiff protesting that the report of the Hon. Noble C. Butler, special master in chancery, filed herein on the 19th of April, 1900, in manner and form is not in compliance with the law nor in accordance with the requirements of the order of reference, and that by reason of its vagueness, indefiniteness and many imperfections and omissions, plaintiff ought not to be required to except specifically to the various alleged findings of fact and conclusions of law professed to be contained therein, and by protestation waiving no objection or exception that could otherwise be taken to said report,

or to the various portions thereof, nevertheless makes and files the following exceptions to the report of said special master filed herein as aforesaid in the following particulars, to-wit:

1. To the statement, finding or conclusion contained in said report, to-wit: The complaint is founded upon a contract, which is claimed by the plaintiff to exist under and by virtue of sections 22 and 23 of the special charter for the incorporation of the de-
340 fendant, which was enacted by the General Assembly for the State of Indiana, and approved on January 26, 1847, as set forth and contained on page 1 of said printed report, whereas the contract upon which said complaint is based, in and by said complaint is alleged to exist under and by virtue of the entire act approved January 26, 1847, and amendments thereto, and more especially, in addition to sections 22 and 23, to section 24 of said act.

2. To the statement finding or conclusion in said report, to-wit: And charges the defendant with fraudulent acts and representations, whereby the plaintiff has been misled and defrauded of its rights and a recovery upon the contract has been delayed and prevented, as contained in said report at pages 1 and 2 thereof, whereas by the opinion of this court, made a part of the record herein, of which said master was fully advised at and prior to the making and filing of his report, it was stated and adjudged by this court that the allegations of fraud contained in said complaint were surplusage and that the gravamen of said cause of action was not in said charges of fraud, and the same were immaterial to the issues tendered by said complaint

3. To the statement, finding or conclusion in said report, to-wit: The evidence consists of the books and records of the corporation and the testimony of George C. Duy, John E. Cleland, and Joseph T. Fanning, concerning the accounts and entries in them, and William R. Harrison.

341 All the testimony of the witnesses, with tables and statements which were prepared from the books by the witnesses, are herein returned into court, as found at page 3 of said printed report, whereas the evidence heard before said special master does not consist of the books and record of the corporation, and said books and records of the corporation were not as such offered or introduced in evidence, but the evidence consists solely of the testimony of the witnesses named and others, and also such extracts and entries from the books and records of the corporation as were formally offered in evidence either as a part of the examination of the witnesses or by making extracts from such books and records and entries a part of the evidence, and the whole of the evidence heard by said special master is contained in the two volumes marked Exhibits A and B, and the statements contained in the volume marked Exhibit C, and that other than is contained in said Exhibits A, B and C no evidence whatever was either offered or heard by said master upon said reference.

4. To so much of said report as is found at page 3 of said printed

report in the following language: The reference to me in this case is not for an accounting only.

It requires me to find and determine whether an account should be stated between the parties and it also requires me to find and determine a just and proper basis for the statement of an account between them, if any should be made, whereas said reference to said master is and was solely for an accounting, and he was not required to find and determine whether an account should be stated between the parties, that fact having been adjudged and determined by the court.

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And said master was by the order of reference required to hear and report to the court the evidence, together with his findings of fact and conclusions of law upon all the controverted questions in said cause.

And said master was not limited by said order to finding and reporting his conclusions upon those questions only that in his opinion were in favor of the one or the other party.

5. To so much of the report as being embraced between the words: But as the superior court seems to have decided that there is such a special contract between the parties in the provisions of sections 22 and 23 upon which the present action is maintainable, as found at page 14 of said printed report, and the words, the time for a strict construction of those provisions in favor of the State has passed, and the parties are on precisely the same footing of complete equality as other parties who have entered into contractual relations, as found at page 17 of said printed report, as finds whether as a finding of fact or as a conclusion of law that the full sum invested and the capital employed as used in the 23rd section of said charter, means the whole investment by the corporation in its plant and property, whereas the master should have found and reported that within the true sense and meaning of said charter the full sum invested and the capital employed meant, and was by said contract and charter intended to mean only so much of the capital employed and the sum invested by the stockholders in the construction of said road within the period allowed by said charter for its construction.

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And said words did not include any borrowed money, donations or earnings applied by said company in the betterment or improvement of the road, as it had been constructed with the moneys contributed or invested therein by said stockholders.

6. To so much of said report as — embraced in the language beginning on page 3 of said report with the words:

In the performance of these duties it is necessary for me to have an adequate understanding, and ending with the words:

If therefore my search for the legislative intent in these provisions of the charter were not restricted by the ruling and opinions of the superior court, I should find that the State did not irrevocably part with its power to make reasonable regulations concerning tolls and freights for an indefinate or any period of time in the original charter, that by the repeal of section 36, in 1848, it made its mini-

mun of regulation as designated in section 23 an irrepealable contract; and that with this exception there is not any irrepealable contract concerning the regulation of tolls and freights in the
344 charter, as found at the foot of page 13 and the top of page 14 in said printed report.

For the reason that said language and the suggestions herein contained, are impertinent and irrelevant to the controversy herein and to a proper report, it being entirely immaterial what the master would do under some other circumstances than those that exist, and so much of said report is devoted not to a finding of the facts nor to his conclusions either of fact or law upon such facts, but to an effort to advise this court as to errors which said master supposes it had committed in its rulings prior to the appointment of said master.

And such suggestions have no proper place in the report of said special master and should be eliminated therefrom.

7. To so much of said report as is embraced within the words commencing with, the view of the charter which I have expressed is not only in accordance with the rule of statutory construction, as found on page 17 of said printed report, and ends with the words "but it was their policy and purpose to encourage these investments in order that the corporation might develop its plant and property and adequately perform its duties to the public in every way, as found on page 18 of said printed report, as finds that the sole purpose of said charter was to incorporate and obtain a railroad, and that it was no part of that purpose to create or add to the
345 common school fund, whereas, notwithstanding it was the primary purpose of said charter to obtain a railroad it was also a part of its purpose to obtain a revenue for the use of common schools and such revenue belonged both in equity and in law to the common schools and did not belong, either in equity or law, to the traveling and shipping public as found and reported by said master.

8. To so much of said report as being embraced between the words: The corporation was originally authorized by section 12 to build a railroad from some point on the western line of the State eastwardly to the city of Richmond as found at page 18, and ends with the words that the design and purpose of the legislature were that such railroad should extend from a point on the western line of the State to the city of Indianapolis, and that such railroad was not completed until these points were connected by it, and it was in full operation between them as found at the foot of page 19 and the top of page 20 of said report, as finds—

(*a.*) That if there is anything in the contention that the railroad or any part of it should have been constructed eastwardly instead of westwardly from such a point, in literal compliance with the terms of the charter it might have been available in a proceeding for the forfeiture of the charter, but it is not available in the present suit.

(*b.*) That further discussion is rendered unnecessary by the
346 amendment of the charter on March 6, 1865, which extended the time of construction for a period of seven years from that date.

(c.) That there was not on that date—30th of November, 1856—a railroad between any point on the western line of the State and the city of Terre Haute as authorized by the charter.

(d.) That as a matter of fact the railroad which was authorized by the charter had not been completed on November 30, 1856, and the books and records of the corporation show that large sums of money were actually invested in the betterment of the railroad between that date and 1869.

(e.) That if the position of the State be correct there were really two railroads built under this charter, one of them being a railroad from Terre Haute to Indianapolis, and the other being a railroad from Terre Haute to a point on the western line of the State. And:

(f.) That the design and purpose of the legislature were that such railroad should extend from a point on the western line of the State to the city of Indianapolis, and that such railroad was not completed until these points were connected by it, and it was in full operation between them.

Whereas there was never any contention, either in the complaint or before the master, that the railroad should have been con-
347 structed eastwardly instead of westwardly, and the master should not have reported that there was such a contention.

And whereas further, the amendment of the charter of March 6, 1865, did not extend generally the time of the construction of said road for the period of seven years, or for any period, but, on the contrary it was expressly and explicitly ascertained and determined by the legislature, and such determination was approved by the defendant, that the road had long prior to 1865, been completed with the exception only of that part from Terre Haute to the western line of the State, and the master should have so found and reported.

And whereas by said charter it was explicitly and in terms provided that as to any portion of said road completed within the period of fifteen years, the right of the company should be as full and absolute as though the entire road had been completed, and there was and is no requirement in said charter that said defendant should build a road from Indianapolis westward to the State line, or from the State line eastward to Indianapolis, but only that said company should build so much of said road as might be for its interest to complete.

And the master should have so found and reported.

And whereas further the books and records of said company show that on the 30th of November 1856, said road was fully
348 completed and its construction account closed, and the expenditures of money thereafter upon said road were simply a proper use by said road of its earnings in the betterment and improvement of the road and increasing its facilities for business.

And the master should have so found and reported.

9. So much of said report as is found in the words:

The State introduced in evidence the books and official reports of the officers of the corporation, and these were practically all the

evidence in the case, as found at page 20 of said report, whereas, the fact was, and the master should have so found and reported, that the State did not introduce in evidence the books and official reports of the officers of the corporation, but only such portions and extracts therefrom as are contained in the report of the evidence filed by said master with said report, and contained in said Exhibit-A, B and C to said report.

And that other than as contained in Exhibits A, B, and C, no portion of said books or official reports of the officers of said corporation were offered in evidence either by the plaintiff or by the defendant.

And the master should have so reported.

10. To so much of the said report as begins with the language: A construction account is ordinarily an index of the amount of investment but it is not conclusive.

349 Operating expenses are not any part of an investment, but the fact that items of expenditure for the permanent improvement and betterment of a railroad have been charged as operating expenses does not change the real character of those items, as found at page 20 of said printed report; and ends with the language: And the total of $259,799.14 is included in my statement of the full sum invested, as found at page 21, whereas said master should have found and reported that said road was completed by the 30th day of November, 1856, and that the board of directors so reported to said corporation and caused the construction account to be closed.

And each and every of the expenditures thereafter made included in the aggregate amount of $259,799.14 were portions of the earnings of said road not contributed by the stockholders but used by said road in bettering its facilities for the transaction of its business, and did not, nor did any part or parcel thereof constitute the constitution of said road, and except as to the item of $8,896.89, 836.00 $4,514.75 and $5,459.08 each and every of said items embraced in the aggregate of $259,799.14 were by said corporation expended in the improvement and betterment of said road and rendering its facilities for doing business better at a time subsequent to the time when by the terms of the charter it was permitted to continue in the construction of its road, to-wit: after the expiration of fifteen years from the commencement thereof.

350 11. To so much of said report as is contained in the words: As the special contract was between the State and the corporation it must be considered as having exclusive reference to the full sum invested by the corporation from its own funds, as found at page 22 of said printed report, whereas said master should have reported and found that the contract between the State and the corporation was and should be considered as having exclusive reference to the moneys invested by the stockholders in the construction of said road, and did not include any investment other than the investments by the stockholders.

12. To so much of said report as is embraced within the words:

The contract requires that the ten per centum per annum upon the full sum invested shall be added thereto.

It has been urged upon me by the State that interest at the rate of ten per centum per annum is meant.

An adoption of that view would require the interpolation of more words in the contract.

It is unnecessary to depart from the plain letter of the contract in any way.

By describing it as a contract for the payment of interest a fallacious analogy is substituted for the real contract itself which is simply a contract for ten per centum per annum on the full sum invested.

As an inference from that analogy the State contends that
351 the rule of partial payments in the calculation of interest between a creditor and his debtor should be applied in taking this account.

In my opinion the rule of partial payments is not required by the contract, and is inapplicable thereto, as found on page 23 of said printed report, whereas, said master should have reported and found that it was the true intent and meaning of said contract that in determining the period when the earnings in excess of fifteen per centum upon the amount invested by the stockholders in the construction of said road, were to be paid to the treasurer of State for the use of common schools, and that ten per cent. per annum should be allowed upon the amount of such investment, and that in determining when that period has been reached, the doctrine of partial payments should be applied.

That is to say: that whenever out of net earnings received and the dividends declared or should have been declared, the amount invested by the stockholders, with ten per centum per annum had been returned to them, the right of the school fund to receive of the earnings in excess of dividends at the rate of 15 per cent. should become absolute.

13. To so much of said report as is embraced within the words: In accordance with these views, I find and report that the full sum invested, with ten per centum per annum thereon, upon the completion of the railroad and at the time when the corporation
352 surrendered its special charter on January 17, 1873, was $4,663,638.50 as found at page 23 of said printed report, whereas, the master should have found and reported that the full sum invested only amounted to the sum of $1,216,690.05, and that that sum, with ten per centum per annum thereon, had been returned to the stockholders—

(*a.*) In dividends by the year 1864; and

(*b.*) By the net earnings which ought to have been declared in dividends but which had not been declared by said company, in violation of its contract and its duty to the State, during the year 1862.

And that from and after said period respectively it was the duty of said defendant to have paid over to the treasurer of State for the

use of common schools all of said net earnings in excess of $182,503.51, during each and every year thereafter.

14. To so much of said report as is contained in the following language: The provisions of section 24 concerning dividends do not limit the discretion of the directors in these respects. Under its provision dividends were to be declared from so much of the profits as the corporation may deem expedient, and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper.

The broad discretion concerning the declaration of divi-
353 dends which was committed to the corporation and its directors by the provisions of that section clearly included the right to determine the amount of all dividends or whether any dividends should be declared or not.

Their discretion was limited only by the requirement that dividends should not be made for a greater amount than the net profits after deducting all present and prospective expenses from them.

As found at page 24 of said printed report whereas, the master should have reported and found that the provisions of sections 24, concerning dividends, did limit the discretion of the directors with respect to making dividends and that under the terms of said section it was the duty of said directors except in so far as they should determine that it was necessary to retain a proportion of the profits as a contingent fund, to meet subsequent expenses, to cause the net earnings of said company to be distributed in dividends to the stockholders until such time as the amounts invested by said stockholders, together with ten per centum per annum had been returned to them, save in so far as it was necessary, in the judgment of said directors, to use net earnings in increasing the facilities of said road or placing it in a proper condition to meet the requirements of the traveling or shipping public and the proper keeping up and betterment of said road for that purpose.

354 15. To the statement finding or conclusion contained in said report, to wit: In the absence of fraud or bad faith, these and other corporate transactions which are hereinafter mentioned are unimpeachable.

They are not inhibited by the charter, and they are legitimate in themselves.

The complaint makes divers and sundry charges of actual and positive fraud against the corporation and its officers and directors.

These charges are not sustained by the evidence.

It does not appear from the evidence that the corporation either directly or indirectly misrepresented any facts to the State, or willfully concealed any facts from the State, or was guilty of any fraudulent acts or ommissions which misled the State in any way, as found at page 25 of said printed report, whereas, the master should have found and reported that the directors failed and refused to make dividends of the net earnings over and above such sum as they might deem necessary to reserve for future contingencies, and by so doing it was made to appear that the time had not arrived when the

school fund was entitled to participate in said net earnings, and that the directors in so doing must be conclusively presumed to have intended such consequence of their action in failing to declare dividends of their said net earnings; and said master should have found and reported in that connection that said directors at no time
355 reserved a fund for future contingencies, and no such account was ever entered upon the books of said company in any form and no order or other action of the board was ever had or made showing an intention to reserve a fund to meet future contingencies, and that there was no necessity to reserve a fund for future contingencies, and that except as said net earnings were used in the betterment, improvement and repair of said road from time to time as said directors ordered, there was no reason why the whole of said net earnings should not have been divided among the stockholders and that by so failing to make such dividends of the net earnings the rights of the State were as effectually interfered with by such action as though the action had been had by the directors for the actual fraudulent purpose of preventing the school fund from participating in the net earnings of said road as provided by said charter.

16. To so much of said report as being embraced between the words, various analogies have been suggested by the State as descriptive of the relation between the parties,

The State has been alternat-ly described as a partner, as a common stockholder and as a *cestui que trust*, as found at page 26 of said printed report, and the words, as the duty of hastening or accelerating the time when the contract becomes operative must be inevitable before that time arrives, it is evident that such a duty could
356 not have been imposed by the contract itself, as found at page 28 of said printed report, as finds that there was no obligation upon the directors to make dividends of the earnings, to the end that the time should arrive when the full sum invested, with ten per centum per annum thereon having been returned through the dividends to the stockholders, the right of the State to participate in said earnings should be accelerated, and that the directors were at liberty to decline to make dividends for the purpose of postponing the time when the State should participate.

And that the directors of said corporation and said corporation sustained no fiduciary relation whatever to the State, and could not be held to sustain such fiduciary relation until by reason of the declaration of the dividends which they were at liberty to make or not make as they might desire, the full sum invested with ten per cent. per annum thereon, had been equaled by the aggregate amount of dividends declared.

And that therefore the directors were at liberty, by the failure to declare dividends to prevent the time from ever arriving when the State might participate in the net earnings as required under section 23, and that the natural and unavoidable result of the action of the directors which resulted in postponing the contingency upon which the liability of the corporation to the State depended,
357 were in themselves perfectly legitimate, and that in the absence of proof of positive fraud on the part of the corpora-

tion, it could not be held that the contingency was improperly delayed, and such fraudulent — could not be inferred from such delay. And that such delay was the necessary result of the contract fixed by the legislature, whereas, the master should have found and reported that under the terms of said contract the directors in the declaration of dividends, acted not only as trustees for the corporation, but as trustees for the State in fixing the time when the rights of the State to participate in the net earnings should arrive, and that it was the duty of said corporation to declare dividends of all the net earnings of said corporation except only as to such amounts as they might determine were necessary to be used and as they — used in the betterment, improvement and keeping in repair of said property, so as to meet the wants and requirements of the traveling and shipping public, and except as they might determine it was necessary to reserve a fund for contingencies.

And that said master should have found and reported that said road did from time to time use of its net earnings all that was deemed necessary to keep and place said road in proper condition to perform its public duties, and said directors did not find that it was necessary to reserve a fund for future contingencies, and wholly failed to create such contingent fund or make any orders or
358 entries in respect thereto, but continuously year by year failed and neglected to declare dividends of the whole amount of net earnings over and above any necessities of the road, and kept on hand a large and unnecessary amount of money which they designated as a surplus fund and which they from time to time invested in the stock of other roads, in bonds and other securities, which by the terms of their charter they were not permitted to invest in.

17. To so much of the report as being embraced between the words: If the corporation is chargeable with such a duty in the present case, it is chargeable therewith upon a theory which overthrows the whole contract, as found at page 28 of said printed report, and the words The proper remedy for any breach of duty under that general contract is a proceeding in nature of *quo warranto*, and the corporation is not collaterally assailable for such a breach of duty in the present suit, which is upon the special contract only, as found on page 29 of said printed report, as finds that the only remedy for the failure of the corporation to declare dividends, and thus cause the time to arrive when the State should participate in the net earnings, was in proceedings in the nature of *quo warranto*, and that such action by the board of directors cannot constitute the basis of any right or claim by the State in this proceeding, whereas the master should have found and reported that the action
359 of the directors in failing to declare dividends of the net earnings, and by such action apparently postponing the time when the right of the State to participate in the net earnings should arrive, was a matter to be considered and determined in this action, and that the action of the board in failing to declare dividends of the net earnings that had been made and that were not necessary to be used in keeping the road in condition, authorizes in this pro-

ceeding the court to treat the dividends as though they had been actually declared and paid to the stockholders.

18. To so much of the report as being embraced between the words: An incident of that contingency was the regulation of tolls and freights, and it is one of the charges in the complaint that these and other corporate acts were also for the fraudulent purpose of preventing such regulation, as fouud at page 29 of said printed report.

And the words: I further find and report that the State has not shown any legal or equitable ground for interference by the court or its officer with the discretionary acts of the officers and directors of the corporation in the declaration of dividends, or in withholding them, or which would authorize a judicial revision of these acts, as found at page 30 of said printed report, as finds that the State has not shown any legal or equitable ground for interference by the court or its officer with the discretionary acts of the officers
360 and directors of the corporation in the declaration of dividends, or in withholding them, or which would authorize a judicial revision of those acts, for the reason that the statutes of Indiana enacted before that time and after show that there were numerous other special charters of similar tenor enacted by the legislature under which no attempt was made by the legislature to realize anything for the benefit of the common schools and that the legislature by a general act for the incorporation of railroad companies passed in 1852, furnished a full and free opportunity to corporations to relieve themselves of all pecuniary liability to the State for the benefit of the common schools by the mere abandonment of the special charters for the general law, and that there had been no regulation of tolls and freights by the State nor could there be any exceptions by general law, and an exemption from such general regulation had been practically worthless, whereas, the master should have found and reported that it was the endeavor of the General Assembly, and it was the history of the times, that the General Assembly attempted to secure a revenue for the common schools through the issuance of charters to railroad corporations, and especially through the charter to the defendant in this case. and that the general railroad law passed in 1852 only authorized companies holding special charters, and especially this com-
361 pany, to become relieved from their obligations under their special charters to afford a revenue to the common schools by surrendering the immunity which such corporations, and this corporation, held from regulation of its tolls below the minimum amount provided in the charter.

And he should have further found and reported that the State had shown both legal and equitable grounds for inquiry into the acts of the corporation and its directors in the declaration of its dividends, and that upon such inquiry it should have been reported that dividends were not made of the earnings for the purpose of preventing the State from participating in the earnings of said corporation.

19. To the statement, finding and conclusion of said report, to-wit: On the other hand, the State insisted that the sum of $117,137.48 which was paid by the corporation as a Federal tax on its dividends should be added to them and included in the aggregate of dividends on the ground that it was a liability of the stockholders which was paid by the corporation for them.

But after several divided and conflicting opinions the Supreme Court of the United States unanimously held in Railroad Company *vs.* Collector, etc. 100 U. S. 595, and held since in United States *vs.* Erie Railway Co., 106 U. S. 327, and Memphis & Charleston R. R. Co., *vs.* United States, 108 U. S. 228, that the Federal tax on the dividends of a corporation is a liability of the corporation
362 itself and not a liability of its stockholders, the amount of the Federal tax, as aforesaid, is accordingly excluded from the aggregate of dividends herein, as found at page 31 of said printed report, whereas, said master should have found and reported that the sum of $117,137.48 was paid by the defendant by reason of its dividends for and on account of the stockholders and was so required by the laws of the United States, and that said amount instead of being deducted from the net earnings, should have been added to the amount of the dividends to the stockholders, and that said taxes were charged upon the books of the corporation to the stockholders and were a proper charge against the stockholders and not against the corporation.

20. To the statement finding or conclusion in said report, to-wit: In accordance with these views I find and report that the aggregate amount of dividends which have been declared on the completion of the railroad and at the time when the corporation surrendered its special charter on January 17, 1873, was $4,341,274.98 and that the same did not then amount to the full sum invested with ten per centum per annum thereon, and I further find and report that the aggregate amount of dividends declared by the corporation did not at any time between the date of the special charter and January 17, 1873, amount to the full sum invested with ten per centum
363 per annum thereon, as more fully appears from the tables which are hereto annexed, as found at the bottom of page 31 and the top of page 32 of said printed report, whereas, said master should have found and reported that the aggregate amount of dividends which had been declared at the time when the corporation surrendered its special charter, January 17. 1873, was $4.458,412.46, and that in addition thereto there was at that time on hand a surplus fund of $1,186,143.12, and that the aggregate amount of dividends declared had exceeded the full sum invested, with ten per centum per annum thereon as early as the year 1864.

21. To the statement finding or conclusion contained in said report: Another condition of the promise by the corporation was that it would pay such amount of the surplus profits if any, as remained after reserving such proportion as may be necessary for future contingencies.

If a balance remained, the State might recover it, if none remained, there could not be a recovery by the State.

The existence of such a balance is a condition precedent to the right of recovery.

It is a part of the plaintiff's case to prove the happening of an event, or a state of circumstances, which is fixed by the contract as a condition precedent, and it is not excused from doing so by the mode in which the books of the corporation were kept.

364 1 Burns' R. S. 1894, sec. 373; Watson *vs.* Deeds 3 Ind. App. 75; Johnson *vs.* Bucklen 9 Ind. App. 154; Scouten *vs.* Eislord, 7 Johns. 36; Bush *vs.* Barnard 8 Johns. 407.

There is an entire failure of proof on that point, as found at page 32 of said printed report, whereas, said master should have found and reported that said corporation did not, through its directors or otherwise, at any time reserve any proportion of the net earnings for future contingencies, nor did they at any time determine that it was necessary to reserve such proportion of the earnings over and above the dividends declared for future contingencies nor was there at any time any necessity whatever for the reservation of any such proportion of the net earnings to meet future contingencies, as said board of directors and said corporation at the time well *known* and recognized, and for that reason said board, neither by order, entry or in any other manner, reserved any proportion of the net earnings to meet such future contingencies.

22. To the statement, finding or conclusion contained in said report, to-wit: Evidence was introduced by the State to show that the corporation invested money in Government bonds that it purchased stock in other corporations that it purchased its own stock, that its purchase of its own stock was made at an ex*h*orbitant price and for an illegitimate purpose that stock was improperly issued, that

365 stock dividends were illegally declared, that it made donations of money to the volunteer fund and an agricultural society.

Some of these transactions were *ultra vires* others were not.

But it does not appear that these transactions of the corporation were had and done with the fraudulent purpose of evading a liability to the State, or preventing or delaying the contingency on which that liability depends or that there is or has ever been any such privity of relation between the parties as would entitle the State to challenge those transactions of the corporation in the present suit, or that, if they were successfully challenged, it would change the result, a further consideration of them, or a finding thereon is deemed unnecessary.

As found in said report at pages 32 and 33 whereas, said master should have found and reported that said defendant invested $100,000 in Government bonds, that it purchased stock and bonds in other corporations to the amount of $1,485,717.48, that it purchased its own stock at the price of $531,235.00.

Whereas, said stock was not worth, and said stockholders well

knew that it was not worth, any sum in excess of the sum of $440,235, and that said purchase of stock was made for the purpose of enabling certain of the stockholders to discharge one president and elect another, that $55,000.00 of stock was issued im-
366 properly, that on the 30th of November, 1856 a stock dividend of $211,600.00 was declared and stock therefore, was issued to the stockholders and that a stock dividend of $376,700.00 was issued in April, 1864, to the stockholders, and that said stock dividends were illegally declared and issued for the improper and illegal purpose of having it appear that there was a greater amount of stock outstanding and a larger sum had been invested in said road than had actually been so invested, and of thereby having it appear that the time had not arrived and the time would not arrive, when the State was entitled to participate in the net earnings, and that it used $6,-00.00 of the net earnings in donations to volunteer funds and $19,000.00 in influencing legislation by the General Assembly of the State, and that all of said transactions were *ultra vires* and resulted in making it appear either that the time had not arrived when the State was entitled to participate in the earnings of said road, or that the amount due to the State was a lesser sum than was actually so due, and that such transactions were had and done with the fraudulent purpose of evading its liability to the State and of preventing or delaying the contingency on which the liability depended, and that there was such privity of relation between the parties as to entitle the State to challenge these transactions in this action and that when so challenged they would change the
367 result, and that therefore, it was the duty of said master to find and report upon such transactions.

23. To the statement, finding or conclusion embraced or contained in table No. 1, as found at page 34 of said printed report.

Whereas, said master should have found and reported that the full sum invested by the years — as follows:

368

1847	2,411.00
1848	5,185.00
1849	51,990.00
1850	148,428.71
1851	173,465.81
1852	225,509.81
1853	63,642.14
1854	168,568.80
1855	47,031.97
1856	108,319.77
1857	48,174.30
1858	13,381.75
1859	4,460.58
1862	52,634.88
1863	68,692.98
1864	5,352.70

1865	24,979.27
1866	4,460.58
Total	1,216,690.05

24. To the statement, finding or conclusion embraced in table No. 2, as found at page 35 of said printed report.

Whereas, said master should have found and reported that the dividends declared were as follows:

369

Dividends for 1853	51,004.73
" " 1854	74,201.00
" " 1855	93,645.00
" " 1856	179,052.00
" " 1856 stock	211,600.00
" " 1857	163,374.00
" " 1858	137,645.00
" " 1859	137,895.00
" " 1860	138,145.00
" " 1861	138,145.00
" " 1862	173,169.69
" " 1863	201,761.32
" " 1864	335,646.09
" " 1864 stock	376,700.00
" " 1865	243,050.52
" " 1866	247,345.23
" " 1867	292,253.70
" " 1868	251,134.70
" " 1869	251,134.70
" " 1870	247,915.04
" " 1871	244,695.38
" " 1872	239,077.11
" " 1873	29,822.25
Total	4,458,412.46

25. To the statement finding or conclusion contained in table No. 3 of said report as found at page 36 of said printed report, whereas, said master should have found and reported a table in manner, form and substance as follows:

370 Total sum invested by stockholders in construction of road, aggregating $1,216,690.05, with total net earnings by years applied, on partial payment plan, to reduction of total investment, with 10 per centum per annum thereon.

Investment	1847 ...	$2,411.00	— per centum thereon...		241.10
"	1848 ...	5,185.00			
		7,596.00	10 per cent. thereon.....		759.60
"	1849 ...	51,990.00			
		59,586.00	10 per c-nt. thereon.....		5,958.60
"	1850 ...	148,428.71			
		208,014.71	10 " "		20,801.47
"	1851 ...	173,465.81			
		381,480.52	10 " "		38,148.05
"	1852...	222,509.81			
		606,990.33	10 " "		60,699.03
"	1853...	63,642.14			
		670,632.47	10 " "		67,063.25
"	1854...	168,568.80			
			Total 10 per cent.....		193,671.10
	Total to 1854..	839,201.27			839,201.27
					1,032,872.37
Deduct net earning		1851.....		2,420.93	
"	"	1852.....		45,860.05	
"	"	1853.....		63,395.71	
"	"	1854.....		114,537.55	
					226,214.24
371	Balance of total investment and ten per cent. per annum thereon to 1854.....				806,658.13
Ten per centum thereon.....					80,665.81
Investment 1855.....					47,031.97
	Total investment and ten per centum per annum to 1855.....				934,355.91
Deduct net earnings for 1855.....					148,327.32
					786,028.59
Add 10 per centum per annum to Nov. 30, 1856 (11 months).....					72,052.62
Add investment, 1856.....					108,319.77
					966,400.98

Deduct earnings, 1856		359,654.06
		606,746.92
Add 10 per centum to Nov. 30, 1857		60,674.69
Add investment, to Nov. 30, 1857		48,174.30
		715,595.91
Deduct earnings, 1857		187,730.17
		527,865.74
Add 10 per centum, to Nov. 30, 1858		52,786.57
Add investment, to Nov. 30, 1858		13,381.75
		594,034.06
Deduct earnings 1858		161,519.43
		432,514.63
Add 10 per centum, to Nov. 30, 1859		43,251.46
Add investment, 1859		4,460.58
		480,226.67
Deduct earnings 1859		160,082.62
		320,144.05
Add 10 per centum, to Nov. 30, 1860		32,014.40
		352,158.45
Deduct earnings 1860		191,366.82
372		160,791.63
Add 10 per centum, Nov. 30, 1861		16,079.16
		176,870.79
Deduct earnings 1861		189,233.74
Balance over		12,362.95
Earnings 1862	352,287.44	
Deduct investment 1862	52,634.88	
		299,652.56
Earnings 1863	316,570.48	
Deduct investment 1863	68,692.98	
		247,877.50
Earnings 1864	393,637.38	
Deduct investment 1864	5,352.70	
		388,284.68
Earnings 1865	362,536.27	
Deduct investment 1865	24,979.27	
		337,557.00
Earnings 1866	326,913.30	
Deduct investment 1866	4,460.58	
		322,452.72

Earnings 1867	468,641.71
Earnings 1868	430,443.38
Earnings 1869	366,199.52
Earnings 1870	278,720.54
Earnings 1871	336,988.96
Earnings 1872	296,589.00
Earnings 1873 part	103,403.26
Total	3,889,173.78
Deduct 15 per centum dividends on full sum invested, $1,216,690.05 ($182,503.53) per year, from 1867 to January 17, 1873, inclusive 6⅛ years	1,117,834.00
Balance due the State for the use of common schools	2,771,339.78

373 26. To the conclusion of law reported at page 33, to-wit; As a conclusion of law from all the facts which I have found and reported herein, and upon the whole case, I find and report that the plaintiff is not entitled to recover from the defendant any sum whatever.

Whereas, said master should have stated, as a conclusion of law, that the plaintiff was entitled to an accounting, and upon such accounting to recover from the defendant the sum of $2,771,339.78.

27. For that the master in and by his report failed and neglected to report that the plaintiff, at and prior to the commencement of the action herein, had made a written demand upon the defendant for an accounting. Whereas, it appeared from Exhibit No. 1 and the evidence at pages 2 to 5 inclusive, that on the 13th day of March 1897, and prior to the filing of the complaint herein, a proper demand had been made in writing upon said defendant for such accounting.

28. For that the evidence showed, and the master should have so found and reported, that said road, except as to the extention from Terre Haute westward to the State line, was fully completed by the 30th day of November, 1856, and the board of directors so determined, and it was so reported to the stockholders and entered upon their books of record, and it was so ascertained and determined by the General Assembly at its session in 1865, in which determination said defendant assented, and the action of the General
374 Assembly thereon was accepted by said road whereas, said master, in and by his report, has failed to find when, if ever, said road was completed, but has attempted to report that it had not been so completed on the 30th day of November, 1856.

29. That the evidence shows, that the master should have so found and reported, that said defendant commenced the construction of said road during the year 1847, whereas, said master wholly failed and neglected to make any finding whatever as to the time when said defendant commenced the construction of its said road.

30. That the evidence shows that the full sum invested in the

construction of said road up to the time of its completion, including therein the amounts that had been up at that time expended in such construction and for which the bonds of the company were outstanding, but which bonds were afterwards surrendered and exchanged, in accordance with the amendments to said charter, for the stock of said company, aggregating the sum or amount of $1,216,690.05 and no more, and the master should have so found and reported, whereas, said master, contrary to the facts and the evidence, found and reported that the full sum invested aggregated the sum of $1,788,693.56, erroneously including however in said amount, moneys not invested in such construction by the stockholders, moneys used from net earnings in repairing, improving and bettering the road in order to enable it to comply with
375 its public obligations, and moneys expended subsequent to November 30, 1856, when said road was actually completed, and also moneys expended from said earnings subsequent to 1862, and after the time when under the terms of said charter said road was required to be completed.

31. That said master should have found and reported as a conclusion of law, that within the true intent and meaning of section 23, the words, the full sum invested, and the capital employed, meant and were intended and understood by the parties at the time of the passage of the said act and the acceptance of said charter to mean and embrace the moneys invested by the stockholders in the construction of said road and to embrace and cover no other moneys or sums whatever, whereas, said master has erroneously stated, as a conclusion of law, that the terms, the full sum invested, and the capital employed covered embraced and included any and all sums of money used by said corporation in the construction of said road, or in the purchase of cars, rolling stock or other equipment branches, and in the betterment and improvement of said road after it had been formally completed and so reported by the directors to the stockholders, from whatever source said investments were so made, or without reference to the time when they were so made save and excepting only as they represented money that had been borrowed and had not been repaid.

376 32. That said master should have found and reported as a conclusion of law, that as to the time when the aggregate amount of dividends declared had amounted to the full sum invested and ten per centum per annum thereon, the rule of partial payments was applicable and should have been applied.

To the end that the language of said section 23 in that respect should have an intelligent meaning, and that that period should be reached when the amounts invested by the stockholders with 10 per centum per annum thereon, had been returned to them, whereas, said master erroneously stated and reported, as a conclusion of law, that the rule of partial payments was not applicable, and that the dividends declared without 10 per centum per annum should have equalled the amount of the full sum invested with ten per centum per annum.

33. That the evidence showed, and the said master should have found and reported, that the net total earnings of said company per year for each and every of the years from 1851 to 1873 (in part) were as follows:

377

Net total earnings for the year				1851	2,420.93
"	"	"	"	1852	54,860.05
"	"	"	"	1853	63,395.71
"	"	"	"	1854	114,537.55
"	"	"	"	1855	148,327.32
"	"	"	"	1856	359,654.06
"	"	"	"	1857	187,730.17
"	"	"	"	1858	161,519.43
"	"	"	"	1859	160,082.62
"	"	"	"	1860	191,366.82
"	"	"	"	1861	189,233.74
"	"	"	"	1862	352,287.44
"	"	"	"	1863	316,570.48
"	"	"	"	1864	392,637.38
"	"	"	"	1865	362,536.27
"	"	"	"	1866	326,913.30
"	"	"	"	1867	468,641.71
"	"	"	"	1868	430,443.38
"	"	"	"	1869	366,199.52
"	"	"	"	1870	278,720.54
"	"	"	"	1871	336,988.96
"	"	"	"	1872	296,589.00
"	"	"	"	1873 in part	103,403.26
Total					5,656,059.64

378 Whereas, said master wholly failed, neglected and refused to make or state any finding or fact thereon, whatever.

34. That the master should have stated as a conclusion of law, that in the year 1865, the General Assembly of the State granted to the defendant the further period of seven years from and after that time to extend its road from the city of Terre Haute westward to the State line, and at the time of so authorizing such extension, said General Assembly ascertained and determined that prior thereto, said road had been fully completed, except as to such extention in accordance with the terms of said charter, and that said defendant accepted the benefits of said act without protest or objection, whereas, said master wholly failed and neglected to state such conclusions of law, but on the contrary found and stated, as a conclusion of fact and law, that said defendant never had completed its road within the terms of the charter until long after the passage of the act of 1865.

35. That the evidence showed, and the master should have so found and reported, that the net total earnings of the defendant, and

the dividends declared during each of the years from the year 1851 to 1873 inclusive, and the excess of the net earnings over and above the dividends declared, and the expenditures from earnings, were by years as follows:

379 Year.	Net total earnings.	Dividends declared.	Excess of earnings over dividends.	Total excess earns. over dividends.
1851	2,420.93	.....	2,420.93	2,420.93
1852	45,860.05	.....	45,860.05	48,280.98
1853	63,395.71	51,004.73	12,390.98	60,671.96
1854	114,537.55	74,201.00	40,336.55	101,007.51
1855	148,327.32	93,645.00	54,682.32	155,689.83
1856	359,654.06	179,052.00	.....	.....
1856	.....	x211,600.00	30,997.34	124,691.89
1857	187,730.16	163,374.00	24,356.17	149,048.06
1858	161,519.43	137,645.00	33,874.43	182,922.49
1859	160,082.62	138,145.00	21,937.62	204,860.11
1860	191,366.82	138,145.00	53,221.82	258,081.93
1861	188,233.74	138,145.00	51,088.74	309,170.67
1862	352,287.44	173,169.69	179,117.75	488,288.42
1863	316,570.48	201,761.32	114,809.16	603,097.58
1864	392,637.38	335,646.09	.....	.....
1864	.....	x376,700.00	319,708.71	283,388.87
1865	362,536.27	243,050.52	119,485.75	402,874.62
1866	326,913.30	247,345.23	79,568.07	482,442.69
1867	468,641.71	292,253.70	176,388.01	658,830.70
1868	430,443.38	251,134.70	179,308.68	838,139.38
1869	366,199.52	251,134.70	115,064.82	953,204.20
1870	278,720.54	247,915.04	30,805.50	984,009.70
1871	336,988.96	244,695.38	91,293.58	1,075,303.28
1872	296,589.00	239,077.11	57,511.89	1,132,815.17
1873 in part	103,403.26	29,822.25	73,581.01	1,206,396.18

x Stock. $ Deficiency.

380 And that at no time did the defendant or its board of directors, at the time of making such dividends, ascertain or determine that it was necessary to reserve any portion of said earnings as a fund to meet future contingencies, nor was it necessary to reserve any portion whatever of said net earnings as a fund to meet future contingencies, whereas, said master wholly failed and neglected to make any report in relation thereto, save and except as heretofore in these exceptions pointed out.

36. That the evidence showed and the master should have so found and reported that during the year 1868, and subsequent years, up to and including 1872, the defendant corporation made large and

extraordinary expenditures in the building and constructing of branches, sidings, extentions and equipment, to-wit: in the sum — $1,026,854.51, which said extraordinary expenditures were paid out of the surplus net earnings that had accumulated from year to year in the treasury of the company and which had not been used for the purposes of dividends.

And that said corporation, on the 17th day of January, 1873, accepted the general railroad law of the State, and thereafter operated under it.

And that the effect of said extraordinary expenditures was to dissipate and expend said *said* surplus and accumulations in the treasury of the company immediately preceding the date at which
381 said corporation accepted the general railroad law of the State, whereas, said master wholly failed and neglected to find and report said facts so shown by the evidence, and failed and neglected to find and report, as a conclusion of fact and law, that said extraordinary expenses were so made by the defendant corporation in anticipation of the acceptance of the general railroad law of the State, and for the purpose of dissipating its said surplus and thus preventing the State from realizing or receiving any portion of said surplus and profits.

37. That the evidence showed that the defendant corporation issued its stock to one Chauncey Rose, as trustee for the corporation, in the sum of $50,000.00 for and on account of bonds of the company heretofore issued, and which had been paid off by the corporation long before the issuance of said stock, and that it issued similar stock to said Rose in the amount of $5,000.00 on account of bonds that had theretofore been issued by the company and which had never been surrendered for payment and were supposed to be lost.

And that said stock so issued on account of said bonds in no way represented the cost of the construction of the defendant's road, whereas the master failed and neglected to find and report as a conclusion of law therefrom that said amounts should not be computed as a part of the cost of the construction of said road, or as the sum invested in the construction of the same.

382 38. That the evidence showed that large sums of money, to-wit: $198,902.31 had been paid by the defendant corporation on account of State, county and municipal taxes, whereas, the master wholly failed to find said facts, and wholly failed to find as a conclusion of law therefrom that said taxes, as against the plaintiff, should not be charged as operating or construction expenses, but should be chargeable to the stockholders as so much money received by them on said proporty, and money invested in the corporation, being in no way exempt, from taxation and the effect of so charging or computing said taxes as either operating or construction expenses would be to charge the plaintiff with the amount of the taxes levied upon the defendant's property.

Wherefore, plaintiff prays that these its exceptions, and each and

every of them, may be sustained, and that it may have judgment as asked in the complaint.

WILLIAM A. KETCHAM,
Special Counsel for the State.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Of Counsel.

383 Be it further remembered that on the 2nd day of June, A. D. 1900, the defendant herein filed in open court the following exceptions to the said report of Noble C. Butler, master as aforesaid, to-wit:

STATE OF INDIANA, }
Marion County. }

Superior Court, Room 2.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General, etc.,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD Company. } No. 54555.

The defendant herein, The Terre Haute & Indianapolis Railroad Company, now respectfully presents to the court the following exceptions taken by it to the report bearing date April 19th, 1900, made and filed herein by Noble C. Butler, Esq., special master, to whom this cause was referred by an order of this court, made and entered on the first day of July. A. D. 1899:

Exception first. The master, on page 21 of his report, has erred in stating the sum invested between 1856 and 1869 to be $259,799.14. The sum invested during that period should have been found and stated to be $1,439,629.27.

Exception second. The master, on pages 21 and 22 of his report, has erred in excluding from his statement of the sum invested the
384 sum of $149,577.58. This amount, being on account of discount and interest, should have been allowed and stated as part of the sum invested at the times and in the amounts shown by the testimony of George C. Duy, on pages 452 to 471, both inclusive, of the evidence as reported by the master.

Exception third. The master, on page 22 of his report, has erred in excluding from his statement of the sum invested the sum of $819,163.19, expended during the years 1869, 1870, 1871 and 1872 in the construction of that part of defendant's railroad between Terre Haute and a point on the western line of the State of Indiana. Said sum of $819,163.19 should have been allowed and stated to be a part of the sum invested.

Exception fourth. The master erred in stating the sum invested, plus ten per cent. per annum thereon, as the same appears in table 3 on page 36 of his report. The sum invested, plus ten per cent. per annum thereon, should have been found and stated by the master as the same is stated in Exhibit 58, introduced in evidence before the master by the defendant and by him reported to the court, and which said Exhibit 58 shows the sum invested, plus ten cent. per annum thereon, to have been, on January 17th, 1873, $6,550,399.12 instead of $4,663,638.50, as reported by the master.

Exception fifth. The master erred in holding, on page 31 of his report, that the two stock dividends of $211,600.00 and $376,700.00 should be included in the aggregate of dividends declared, and in including said stock dividends in his statement of the aggregate amount of dividends declared, appearing in table 3 on page 36 of his report. Both said stock dividends should have been excluded from the statement of dividends declared, and the aggregate
385 amount of dividends declared, up to January 17th, 1873, should have been found and stated to be $3,752,974.98.

Exception sixth. The master erred in excluding from consideration the transcript offered by the defendant of certain proceedings had in the circuit court of Owen county, State of Indiana, and which transcript appears in the evidence reported by the master and designated Exhibit No. 62. This transcript should have been considered by the master in determining the issue raised by defendant's answer of former adjudication.

Exception seventh. The master erred in excluding from consideration the opinion of the superior court of Marion county, Indiana, which appears, beginning on page 963 and ending on page 987 of the evidence reported by the master. This opinion should have been considered by the master in determining the issue raised by defendant's answer of former adjudication.

Exception eighth. The master erred in excluding from consideration copy from report of attorney general, which appears, beginning on page 992 and ending on page 996 of the evidence reported by the master. This evidence so excluded should have been considered by the master in determining the issue raised by defendant's answer of former adjudication.

Exception ninth. The master erred in excluding from consideration the report of the attorney general, which appears on page 1000 of the evidence reported by the master. This report should have been considered in determining the issue raised by defendant's answer of former adjudication.

Exception tenth. The master erred in excluding from con-
386 sideration the agreement between the State of Indiana and this defendant, which appears, beginning on page 948 and ending on page 952 of the evidence reported by the master. This agreement should have been considered by the master in determining the issue raised by defendant's answer of former adjudication.

Exception eleventh. The master erred in excluding the evidence specified in the sixth, seventh, eighth, ninth and tenth exceptions

herein, and in finding, as appears on page 33 of his report, that there has been no former adjudication of the matters involved in the present suit. The master should have considered the evidence specified in the sixth, seventh, eighth, ninth and tenth exceptions herein and should have found and reported in defendant's favor on the issues raised by defendant's answer of former adjudication.

S. O. PICKENS,
LAWRENCE MAXWELL, JR.,
Attorneys for Defendant.

JOHN G. WILLIAMS, *Of Counsel.*

Be it further remembered that this cause having been submitted to the court for final hearing, determination, adjudication and decree upon the said report of Noble C. Butler, master as aforesaid, and upon the evidence taken and reported by said master and returned by him with his said report as part thereof, and upon exceptions filed to said report by the parties hereto respectively the court, on the 27th day of October, A. D. 1900, decided and ordered that the exceptions filed by the plaintiff herein to said report, numbered 3, 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 34 and 37 be sustained. And to the sustaining of each of said exceptions the defendant herein at the time excepted separately and severally and 120 days from the 27th day of
387 October, A. D. 1900, were then allowed the defendant herein within which to present to the judge of this court its proper bill of exceptions covering the ruling aforesaid on each one of said exceptions.

Be it further remembered that at the same time, to-wit, on the 27th day of October, A. D. 1900, the court also decided and ordered that the exceptions of the defendant herein to said master's report, numbered 1, 2, 3, 6, 7, 8, 9, 10 and 11 be overruled, and to the overruling of each one of said exceptions the defendant herein at the time excepted separately and severally and 120 days from the 27th day of October, A. D. 1900, were then allowed the defendant herein within which to present to the judge of this court its proper bill of exceptions herein covering the ruling on each one of said exceptions.

Be it further remembered that at the same time, to-wit, on the 27th day of October, A. D. 1900, it was also decided and ordered by the court that the exceptions filed by the plaintiff herein to said masters's report, numbered 1, 2, 4, 8, 12, 14, 15, 25, 32, 33, 35, 36 and 38 be overruled. And to the overruling of each one of said exceptions the plaintiff herein at the time excepted separately and severally and 120 days from the 27th day of October, A. D. 1900 were then allowed the plaintiff within which to present to the judge of this court its proper bill of exceptions herein covering the ruling on each one of said exceptions.

Be it further remembered that at the same time, to-wit, on the 27th day of October, A. D. 1900, it was also decided and ordered by

the court that the exceptions filed by the defendant herein to said master's report, numbered 4 and 5, be sustained. And to the sustaining of each one of said exceptions the plaintiff herein at
388 the time excepted separately and severally, and 120 days from the 27th day of October, A. D. 1900, were then allowed the plaintiff within which to present to the judge of this court its proper bill of exceptions herein covering the ruling on each one of said exceptions.

Be it further remembered that upon the final hearing aforesaid of this cause on said 27th day of October, A. D. 1900, the evidence taken and reported by said master Noble C. Butler and returned by him, with his report, filed herein as aforesaid on the 19th day of April, A. D. 1900, was submitted to the court upon the trial and final hearing of this cause, and was all the evidence given upon the trial of said cause. And the evidence taken and reported by said master Noble C. Butler, and returned by him with his said report as part thereof, was in the words and figures following, to-wit:

389 STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court of Marion County, Room #—, September Term, 1899—Hon. Noble C. Butler, Master Commissioner.

THE STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General,
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

Evidence Introduced Before the Commissioner.

Appearances.

For plaintiff: William A. Ketcham, Esq. R. O. Hawkins, Esq., Rob't S. Taylor, Esq., and F. Winter, Esq.

For defendant: John G. Williams, Esq., S. O. Pickens, Esq. and Lawrence Maxwell, Esq.

390 MONDAY, *October 2nd*, 1899.

The opening statement having been concluded, the plaintiff, to maintain the issue on its behalf introduced the following evidence, to-wit:

That is to say:

Mr. KETCHAM: May the master please, I will first offer in evidence the demand for an accounting on the Indianapolis and Terre Haute road, and the secretary and treasurer, with the acknowledgement of the delivery of a copy of the demand.

The said demand was admitted in evidence and marked "Exhibit 1, Oct. 2, '99, W. S. G., Rep.;" the same being in the words and figures following, to-wit:

To the Terre Haute & Indianapolis Railroad Company, George E. Farrington, secretary, and R. B. Thompson, treasurer:

You and each of you are hereby notified that under an act of the General Assembly of the State of Indiana, entitled:

"An act to require the Terre Haute & Indianapolis Railroad Company, its officers, agents and persons in possession thereof, to account to the attorney general of the State for the amount due and owing to the treasurer of the State for the use of common schools, by reason of the excess of its receipts over its expenditures under the provisions of its charter appropriating the same to the use of the common schools, authorizing a demand for such accounting
391 and suits to enforce the same, the appointment of additional counsel, and providing for the expenses of such litigation and the compensation therefor, creating an auditing board and prescribing its powers, authorizing the attorney general to bid upon the sale of said road and authorizing the payment of such bid, and providing for the operation of said road until the General Assembly shall determine in regard to the disposition thereof, and for other purposes, and declaring an emergency. Approved March 4th, 1897, you are required to forthwith account to me as attorney general of the State, for the amounts due and owing to the treasurer of the State, for the use of common schools, by reason of the excess of the receipts of the Terre Haute & Indianapolis Railroad Company over and above its expenditures, as provided and required by its charter and the amendments thereto, and upon such accounting to pay over to me, as such attorney general, for said treasurer of State, for the use of common schools as aforesaid, the amount so found due upon such accounting, such amounts being the total receipts by said railroad company up to and including the 17th day of January, 1873, from the time when the receipts arising from the operation of said road shall have equalled the amount invested in the construction thereof, together with interest thereon at the rate of ten per cent. per annum, so far as said amounts are in excess of fifteen per centum per annum upon the capital used in the construction of said road.

Pursuant, therefore, to said statute, I now and hereby de-
392 mand of you and each of you that you do, with all reasonable despatch, account to me for the treasurer of State, for the use of the common schools of said State, for the net receipts from the operation of said road from its completion up to and including the 17th day of January, 1873, as far as said net receipts shall be in excess of fifteen per centum upon the capital employed in the construction of said road after the earnings thereof shall have equaled the cost of construction, together with ten per centum thereon as specified in the charter of said road and the act of the General Assembly, approved March 4th, 1897, as aforesaid. And I do further

demand that you do now indicate — me within what time you will be prepared to make such accounting and pay over to me for the use of said common schools the sums so due upon such accounting, and of this demand you will hereby take notice and govern yourselves accordingly.

I have the honor to be,

WILLIAM A. KETCHAM,
Attorney General of the State of Indiana.

393 ROSCOE O. HAWKINS,
ROBERT S. TAYLOR, AND
FERDINAND WINTER,
Special Counsel for the State of Indiana.

TERRE HAUTE, *March* 13, 1897.

We acknowledge the delivery of a copy of the foregoing demand.

R. B. THOMPSON, *Treasurer.*
GEORGE E. FARRINGTON, *Secretary.*

Mr. KETCHAM: The plaintiff will next introduce in evidence the stipulation of counsel in regard to the books.

The said specification was admitted in evidence and marked by the reporter "Exhibit 2, Oct. 2, '99, W. S. G., Rep.;" the same being in the words and figures following, to-wit:

"EXHIBIT No. 2, OCT. 2, '99. W. S. G., Rep."

STATE OF INDIANA, } ss:
Marion County, }

In the Superior Court, September Term, 1899, R. 3.

STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General,
vs.
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } No. 54555.

It is hereby stipulated and agreed by counsel in the above entitled case:—

1. That the books produced to the experts by the receiver,
394 V. T. Malott, are books kept for the period they cover by the T. H. & I. R. R. Co.

2. That the printed and bound copies (2 volumes) of the various reports of the officers of the company furnished to the experts by the receiver, are correct copies of the reports that they purport to be, and that they may be admitted in evidence, as such reports,

without formal proof of authenticity, or the loss or absence of the original reports.

R. O. HAWKINS,
Of Counsel for Pl'ff.
SAMUEL O. PICKENS,
Of Counsel for Def't.

Whereupon the further hearing was adjourned until tomorrow, Tuesday, October 3, 1899, at 10 o'clock a. m.

TUESDAY, *October* 3, 1899—10 o'clock a. m.

The parties met pursuant to adjournment.
Present: The same as on yesterday.

The hearing of the evidence was resumed by the master, as follows:

GEORGE C. DUY, a witness called by the plaintiff, being first duly sworn, testified as follows:

Examination in chief.

Questions by WILLIAM A. KETCHAM, Esq.:

1 Q. Will you tell the master your name?
A. George C. Duy.

395 2 Q. You may state if you have been engaged with others, and if so with whom, in making an investigation and examination of the books furnished you by the receiver of the Terre Haute and Indianapolis road; if so when you began and how long you have been engaged at it?

A. I have been so engaged in connection with John E. Cleland, and Joseph T. Fanning. We began the work in the latter part of May, 1899. The whole committee continued until the first of June, 1899. I have been at work since that time myself, part of the time Mr. Cleland assisted me, up to the present time.

3 Q. What books were furnished to you by the receiver that you examined in connection with your work? If you have a list of them please furnish the list.

A. I have not the list here, but I can state them; two books marked Ledger 1 and Journal 1, which from their appearance I judge to be books kept by the treasurer of the road, and they only continued for a short time and were apparently abandoned. Subsequently there was furnished to me a cashier's cash book, I think of the date of 1864, or 1867 perhaps.

4 Q. Did it cover the period from 1864 to 1867?

A. I think so. There were quite a number of journals and ledgers which I took to be the general books of the company, kept in the first instance by the secretary and along in later years by the auditor. They comprised the dates from 1847 '60 a period subsequent

1873 continuously. There were two bound volumes of the annual reports of the officers and directors to the stockholders which covered also statements made by the secretary and other em-
396 ployees of the road, as the superintendent and master machinest, etc. There were several volumes of stock journals and ledgers, two volumes of minute books, two volumes of stock transfer books, and I think that covers about all.

5 Q. What experience have you had in the examination of books, and the keeping of books, or what we commonly call, as an expert book keeper, if any?

A. Well I have been engaged in that kind of business more or less pretty much all of my business life. I was engaged in book keeping and then I was bank cashier for four or five years and I have had a good deal to do with the settlement of estates and the examination of records and books of various kinds at different times.

6 Q. You may state to the master whether your experience in book keeping has been such as to enable you to investigate a set of books, such as the books kept by the Terre Haute and Indianapolis Railroad Company, and make schedules therefrom showing in brief, or a summary of what had been done as indicated by the books?

A. I think so.

7 Q. Have you done so?

A. I have, yes sir, in connection with the other gentlemen named.

8 Q. Now I will ask you if you have had an exhibit, or exhibits, or statements or schedules, showing as indicated upon the books that were furnished to you by the receiver, the cost of construction of the Terre Haute and Indianapolis railroad, we will say to the 30th of November, 1856?

A. I have.

9 Q. Will you please produce such exhibits as you have
397 prepared commencing with the first item of construction as it appears upon the books of the Terre Haute and Indianapolis road?

A. I submit schedules for that period. I have the originals which were prepared by myself and the other gentlemen, and as prepared they are numbered from 4 to 11A except 6, and No. 11 contains two or three entries of later date, 1864.

10 Q. How about 10?

A. No. 10 also contains an entry of 1864.

11 Q. So that the exhibits that you have made covering the construction of the road from the beginning to November 30, 1856, are Exhibits 4 to 10 inclusive, excluding 6.

A. 4 to 9 inclusive, excluding 6. No sir, that would not cover it all. No. 10 goes down to the end of 1856, and then there is a footing, and there is added thereto an item of 1864 additional. No. 11 is a consolidation of the others, and No. 11 is a summary in different form.

12 Q. Now I will get you to explain to the master what statement or schedule No. 4 includes or covers.

A. No. 4 is an itemized construction account from the beginning

to June 30, 1852, and it covers Exhibits A to K, which are exhibits of the various accounts which enter into the construction account and make part of it.

By Mr. WILLIAMS:

13 Q. From the beginning to June 30, 1852?
A. From the beginning in 1847.

398 By Mr. KETCHAM.

14 Q. What is the first item that enters into the composition of Schedule 4?

A. I think the first item is an entry, a charge to surveying and engineering account.

15 Q. What page of the statement is that on?

A. That is on page 8 of the exhibit. There is no month or date given on the book except 1847.

16 Q. Now you may state to the master from what source, if any other than the books of the company, these various items are obtained.

A. I think they are all from the books. I think I had better explain a little, if you will allow me to suggest, upon the ledger of the company there is a construction account open; to that account are charged from day to day, at various times, the items of expenditure which entered immediately into the construction account charged up to it. During the year there are charges made to other accounts, or during these years, and it is so in subsequent statements; there are charges made to other accounts, such as cord wood, and surveying and cross ties and railroad iron and gravel and interest and discount and relinquishment, and at the end of 1852 those are charged into construction account; and so it runs through each year of this account of construction. Those accounts are kept separate and at the end of each year they are charged over to construction account and so closed. They enter into and become a part of construction account. And this No. 4, the first item charged to construc-
399 tion account proper, as I call it, is in 1849, but as far as I recollect, the first item which enters into construction account is the item I have mentioned before, surveying, in 1847.

17 Q. That item went into construction account by subsequent entry?

A. By the transfer of the surveying and engineering account to the debit side of the construction account.

18 Q. When did that go into construction account, if it did? Look at page 9.

A. That went into construction account in June 1852.

19 Q. Now if you have any typewritten copies made of that Exhibit No. 4 which you have compared with the original in manuscript so as to be able to state whether it is or is not a proper and correct transcript you may state.

A. I have had such copies made, three.

20 Q. Will you produce one of them in typewriting?

A. I think I ought to say—I have been saying that I have prepared these; I mean to say all the time that we prepared them. I did not do all this work.

21 Q. No matter who did the work, state to the master whether you verified it so as to be able to state that it is a proper transcript and a proper statement from the books, and as shown by the books that were furnished you?

A. I verified it. I verified them all, in connection with Mr. Cleland and Mr. Fanning; sometimes by one calling over and the other comparing; sometimes one would read and sometimes another.

22 Q. In this statement that you have made you may
400–444 state whether or not reference is made to the pages of the books from which the entries were taken.

A. In this itemized statement there is reference made to the journal entry, book and page and date, whenever it is given.

Mr. KETCHAM: Now if the master please I desire to offer this statement as evidence.

Mr. WILLIAMS: I would like to ask a question or two first.

Mr. KETCHAM: Certainly.

By Mr. WILLIAMS:

23 Q. Take this statement No. 4 that you mentioned, which is now offered in evidence, does it contain every item of construction that is shown on the books as construction during the period it covers?

A. I think so, yes sir.

24 Q. You have not omitted any at all in making it up?

A. No sir. Sometimes there may be abbreviations. I do not mean to say it is an accurate copy. Substantially it is a copy of the book.

25 Q. You did not select the items to put in it, but you took all the items that you found in the book?

A. I took all that I found in construction account in any way on the book, and run them down from the ledgers to the original items and entries.

The statement, being Mr. Duy's statement No. 4, was admitted in evidence and marked by the reporter "Exhibit No. 3, Oct. 3, '99, W. S. G.;" the same being found in the words and figures following, to-wit:

(See next page.)

445 The WITNESS: The footing of this account is $1,008,855.54. This agrees with the original statement on secretary's Journal A page 152, but is corrected on his ledger by the addition, and on his journal by the addition of several items amounting to $52.73, which attempted correction is wrong. It should be $52.71 which makes the total $1,008,908.27.

By Mr. KETCHAM:

26 Q. Now on what page of Exhibit 3, statement 4, do you find the summary of $1,008,855.54, and where do you find that on that statement, the correction?

A. That is on page 6.

27 Q. The footing is at the top of the page and the corrections follow on the same page. Now you speak of the corrections on the secretary's Journal A, and of some mistake. Will you explain to the master what you mean by that, on page 6 of this Exhibit 3?

A. The entry on top of page 153 Journal A?

28 Q. In the schedule that says page 152?

A. 153. Do you want me to read the journal entry?

29 Q. Yes.

A. "Construction account to treasurer, July 13, 1852, construction account, short charge, pay roll charged out, folio 130, $449.35, $50.00, short charge on bill, taxes, at folio 140, charged $18.25 should be $20.81, difference $2.56, folio 149, for exchange paid on draft to A. S. Winslow 15 cents—that is carried out—$52.73, but the actual footing is $52.71."

30 Q. So it appears on the book as corrected $1,008,908.27 but the footing in fact should have been $1,008,908.25.

446 A. Yes. I did not correct that. In making my schedule I carried the balance forward as it appeared. I might say here that in the examination of these books we ran across some trifling errors in posting and additions, etc., which we passed over; they did not amount to enough to attempt to carry any correction through the book; and then we were employed to show what the books show.

31 Q. Now I will ask you if you made a schedule or statement of the construction account from June 30, 1852, to December 31, 1852, and if so will you produce it, the original and the typewritten copy too.

A. We have a statement here from June 30, 1852, to December 31, 1852, in Exhibits A to N inclusive.

32 Q. You may state to the master whether that exhibit was made as the preceding, from the books that were furnished to you.

A. It was, yes sir.

By Mr. WILLIAMS:

33 Q. What do you call that?

A. This will be Exhibit No. 4. It is my statement No. 5.

By Mr. KETCHAM:

34 Q. On what page of that exhibit do you find the summary of the amounts?

A. On page 4.

35 Q. Will you tell the master what was that amount?

A. The books show $1,311,672.59. This agrees with the secre-

tary's ledger and his published statement for the year
447–486 ending 1852. It should be $1,311,662.59. See error in addition, journal page 195, item $28.05 should be $38.05.

36 Q. Now you may state whether this aggregate that you have given is the aggregate of the construction account between the period that you have named, or whether it begins with the amount included as the result of statement No. 4, Exhibit No. 3.

A. It begins within the amount on No. 4, and embraces all down to December 31, 1852.

37 Q. So that the figures that you have given are the totals up to that time?

A. Yes sir.

38 Q. The details of which as to the $1,008,908.27 are included in Exhibit No. 3.

A. Yes sir.

39 Q. Have you a typewritten copy of the original manuscript copy that you made?

A. I have. The reporter has identified it as Exhibit No. 4.

Mr. KETCHAM: I offer this typewritten copy in evidence.

The statement, being Mr. Duy's statement No. 5, was admitted in evidence and marked by the reporter "Exhibit No. 4, October 3, '99, W. S. G.;" the same being in the words and figures, following to-wit:

(See next page.)

* * * * * * *

487 40 Q. Now, I will ask if you have prepared an itemized statement similar to the others of the construction account from the year 1853, and if so will you produce it?

A. I have; it is here.

41. Q. That is your statement No. 7, is it not?

488–521 A. This is my statement No. 7. That begins with a summary of the items heretofore furnished.

42 Q. $1,311,662.59?

A. Yes sir. Do you want all the items put in?

43 Q. No sir, it begins with the summary that you have heretofore given.

A. The summary of the items I have given, $1,311,662.59, and takes it for the year, to December, 1853.

44 Q. What was the amount in December, 1853?

A. $1,414,284.40. This agreed with the secretary's ledger and with his published statement of January 19, 1854, excepting the secretary's balance is ten cents greater.

45 Q. Now in that, as with the others, you have furnished the exhibits showing the items of the charges to construction account?

A. Yes sir, Exhibits "A" to "K."

46 Q. Did I ask what the exhibits were on statement No. 5? I think I did not. They ran from Exhibits "A" to "N," did they?

A. Yes sir. I think I stated so; I am not positive about it.

47 Q. Have you prepared a verified typewritten copy of your original schedule?

A. Yes sir.

48 Q. Will you produce it, and hand it to the reporter to be marked?

Mr. KETCHAM: May the master please, we offer that in evidence.

The statement, being Mr. Duy's statement No. 7 was admitted in evidence and marked by the reporter "Exhibit No. 5, October 3, '99, W. S. G.;" the same being in the words and figures following, to-wit:

(See next page.)

* * * * * * *

522–530 49 Q. Now, have you prepared a schedule of the construction account for the year 1854?

A. Yes sir; it is my statement No. 8 for the year 1854, with Exhibits "A" to "E."

50 Q. Opening with what amount of the construction account and closing with what?

A. Opening with $1,414,284.40, and closing with $1,426,564.01.

51 Q. Have you prepared a typewritten statement of that? If so, please produce it and hand it to the reporter to be marked.

A. I have done so.

Mr. KETCHAM: I offer that in evidence.

The statements, being Mr. Duy's statement No. 8, was admitted in evidence and marked by the reporter "Exhibit No. 6, Oct. 3, '99, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

* * * * * * *

531–537 52 Q. Now have you prepared such a statement covering the items of the construction account for the year 1855?

A. Yes sir.

53 Q. And with what schedules attached, or exhibits?

A. Schedules "A" to "D" inclusive.

54 Q. Beginning with what amount?

A. $1,426,564.01. That schedule begins with a summary of the items composing that gross amount as copied from an entry on Journal B, page 1.

55 Q. And it closes with what amount?

A. $1,463,408.79.

56 Q. Have you a typewritten copy of that, and if so will you produce it?

A. Yes sir.

56 Q. Hand it to the reporter and let it be identified as Exhibit No. 7.

A. I have done so.

Mr. KETCHAM: I offer that in evidence. The statement being Mr. Duy's statement No. 9 was admitted in evidence and marked by the reporter, "Exhibit No. 7, October 3, '99, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

538 Mr. KETCHAM: In that connection, if the court please, I desire to offer in evidence the original entry from page 1 of Journal B, which is as follows:

"Items composing construction A / C."

"Engineering, $17,914.67. Right of way, $6,983.91. Furniture for offices, depot, boarding house, $1,685.77. Buildings, $69,330.91. Equipment, $230,040.31. Machinery and shops, $17,089.84. Iron spikes, cross ties, and laying track, $480,390.33. Discount and interest, $158,220.66. Contingent, $21,646.37. Graveling, $16,396.59. Fencing, $7,845. Grubbing, grading and bridging, $319,019.65. Total of the construction ac., $1,426,564.01. Real estate, $13,117.12, and union depot and track, $25,640.78. (Carried out) $38,757.90. Total cost of road, January 1st, 1855, $1,465,321.91."

The WITNESS: I can explain that difference now.

57 Q. I will call your attention to the difference on Exhibit 7, between the amounts on page 1 of Journal B and the amounts entering into Exhibit 7, and if there is any explanation of the difference of ten dollars, or any other difference there, I wish you would make it.

A. The entry on the journal embracing *constitution* account, or what has been charged to the construction account, is the same as our statement, and on the journal they added two items, real estate $13,117.12, and union depot and track $25,640.78, making a total of $38,757.90; which I think, without footing them, will make
539 the two agree. That real estate and depot and track had not then been charged to construction account.

Mr. WILLIAMS: That would not make the difference of $10.00 in the equipment.

Mr. KETCHAM: No, that don't account for that $10.00 item at all.

58 Q. I wish you would look at that. I will come back to that presently. Now, I will ask you if you made a statement showing, as it appears itemized upon the books, the construction account for the year 1856, and if in addition to that there appears on the books any other entry in connection with the construction account, if you have made a statement from the books on that matter?

A. My statement No. 10, beginning with the aggregate $1,463,408.79, runs to November 30, 1856, at which date they changed their fiscal year. That statement has Exhibits "A" to "I."

59 Q. What was the aggregate amount up to and including the 30th of November, 1856?

A. The aggregate amount as charged to the construction account, including the two items of real estate and union track and depot, heretofore mentioned, is $1,615,765.22. There is a credit entry November 30, 1856, Journal B, I guess it is page 112.

60 Q. Look and see what it is.

A. It reads as follows:

540 "By profit and loss for excess of cost of road, over aggregate of stock and bonds, $4,315.22, leaving the total cost as charged, $1,611,450." This agrees with the secretary's ledger and with the published statement of December 19, 1856. I have added to this a note at the bottom of page 1. I don't know whether you want that to go in or not.

61 Q. Now, I will get you to refer to the report of the president, made during the year 1856, calling your attention and asking you to point out, if you can find it, any reference in that to——

A. You have asked me something about a subsequent entry which I have not answered yet. The profit and loss entry referred to is on Journal B, page 112.

62 Q. Now I will ask you to refer to the report of the president made during the year 1856, calling your attention and asking you to point out, if you can find it, any reference in that to the construction, or its cost, or the construction account?

A. I find on page 6 of the annual report of December, 1856, the following paragraph:

63 Q. Report of whom?

A. Well, it is a report signed by the president by order of the board.

64 Q. If you find any reference there in that report to the construction account, you may point it out.

A. (Reading:) "It will be noticed by the secretary's report that on the 30th day of November the capital stock and bonds of the company amounted to only $1,399,850, while the construction account is $1,615,765.22, the difference having been paid out of the net earnings, which properly belonged to the stockholders. Be-

541 lieving that the stock and bonds should represent the actual cost of the road, we thought it advisable to declare an extra dividend of twenty per cent. payable in stock, fractions in cash, all of which would be paid on the 6th day of January next, the excess of the cost of the road over the aggregate of stock and bonds to be carried to profit and loss so as to balance the account: and believing it unnecessary hereafter to increase our construction account, unless it should become necessary to lay down a double track, have ordered the construction account closed. In presenting our report to the stockholders at this time it is gratifying to remark that the road is in good order, the entire line fenced, and is amply provided with motive power and working stock and with all the necessary buildings, without a floating debt, and a handsome surplus on hand to meet any ordinary contingency which may occur, our confidence in its future prosperity is undiminished.

65 Q. Now, this report from which you have read is taken from what book?

A. It is taken from the bound volume of annual reports 1853 to 1868.

66 Q. You may state whether that is one of the books produced to you by the receiver as containing the reports of the officers of the company?

A. It is.

67 Q. Now, I will ask you to state what was done with the construction account at that time?

A. The construction account stood on the book, on the ledger, at $1,611,450, until it was changed by an entry in April, 1864.

542 68 Q. Now what items—I suppose that is a sufficient answer to that question, but I will put the question at you directly—what items entered into the construction account as it appeared upon the books of this company during the year 1857?

A. Nothing.

69 Q. 1858?

A. Nothing.

70 Q. 1859?

A. Nothing.

71 Q. 1860?

A. Nothing.

72 Q. 1861?

A. Nothing.

73 Q. 1862?

A. Nothing.

74 Q. 1863?

A. Nothing.

75 Q. Up to April 9th, 1864, between November 30, 1856, and April 9, 1864, what single item of expense was upon the books of the defendant company charged to construction account, from the 30th of November, 1856, to the 8th of April, 1864?

A. Not any.

76 Q. What items, if any, were there entered upon any book of the defendant company that was exhibited to you, whether ledger, journal, or book of other character, from November 30th, 1856, to the 8th of April, 1864, indicating that any sum of money whatever had been used in the construction of the defendant's road?

A. I do not recollect now any entry at all of that character.

543 There is nothing charged to construction account, I am certain.

77 Q. Now, I will get you to turn to page 144 of Journal C.

A. I haven't got it here, but I have a copy of the entry. This copy of it (producing) is absolutely correct.

78 Q. I will ask you to read to the master the entry there with respect to the construction account of the defendant's road.

A. The entry is on Journal C, page 144, April 9th, 1864. Construction account is charged and capital stock account is credited 'for twenty-five per cent. increase, made to stockholders by order of

the board, April 6th, 1864, to all stockholders on the book, April 9th, in consideration of a portion of the earnings having been used in permanent improvement of the road, and purchase of additional equipment and machinery, capital stock $1,522,450, increase twenty-five per cent., $380,612.50, less fractional paid in cash, $3,912.50 (carried out) $376,700.

79 Q. After that entry then, as I understand you, on the 9th of April, 1864, the construction account appeared upon the books amounting to $1,988,150?

A. Yes sir.

80 Q. And in order to reach that amount this additional amount subscribed as being by way of stock dividend, $376,700, is included?

A. Yes sir.

81 Q. With no entry, as I understand you, upon either the journals or ledgers of the company from the 30th of November, 1856, to the 8th of April, 1864, indicating thay any additional expenditures had been made on account of the cost of construction?

544 A. There is no charge anywhere to construction account. There were charges made for equipment, repairs, &c., which did not, to me, indicate anything in the way of construction.

82 Q. Now, I will ask you to state if you can find any entry on the minute books of the company with respect to the action of the board of directors held on the 30th of November, 1856, in regard to the construction account—not November 30th, but the meeting in December?

A. On the minute book marked Record A. under date of December 17th, 1856—the page is not given—amongst the records of the meeting of the board is the following paragraph:

"On motion it was ordered that a stock dividend of twenty per cent. payable in stock, and charged to the surplus account, be paid to the holders of stock at the close of the fiscal year, November 30, fractional shares to be paid in cash. It was ordered that the excess of construction account over the aggregate of stock and bonds, after the addition of the stock dividend, be charged to profit and loss?"

By the MASTER:

83 Q. What is the date of that entry?

A. December 17, 1856.

By Mr. KETCHAM:

84 Q. In that connection I wish you would turn to the minute book of the company, under date of April 6th, 1864, and give us the entry there in regard to that stock dividend.

A. I don't think I have it here.

545–560 85 Q. Then, I will withdraw that question until we have that book here. I will ask you to state if you have prepared a typewritten copy of this construction account, and if so, if you will produce it, and hand it to the reporter to be identified as Exhibit No. 8?

A. Yes sir.

Mr. KETCHAM: I offer that in evidence.

The statement, being Mr. Duy's statement No. 10, was admitted in evidence and marked by the reporter "Exhibit No. 8, October 3, 1899, W. S. G.;" the same being in the words and figures following, to-wit:

(See next page.)

561 86 Q. Now, before going to the next statement, I will get you to refer to the president's report of January 17, 1863, page 6, and also the report of January 9th, 1855, and I will call your attention to the expression in that "The road is amply stocked for the present, but will have to be increased the coming season to enable us to meet the anticipated increase of business." Do you find that in that report?

A. Yes sir.

87 Q. Now turn to the report of January 9th, 1855, the president's report. I will ask you if you find in that the statement "This condition of the track, motive power and equipment of the road are ample and in the most servic-able order; the supplies and materials on hand for repairs, fuel, oil, and so forth, are sufficient for all ordinary demands." Do you find such language? Is that there?

A. Yes sir.

88 Q. Now, I will ask you to produce, if you have made one, a consolidated construction account, the details of which you have heretofore given from 1849 to 1864?

A. Yes sir.

89 Q. The aggregate of which, as appears on page 6, is the amount heretofore given, $1,988,150?

A. Yes sir.

Whereupon, the hour of twelve o'clock having arrived, the hearing was adjourned until one o'clock p. m.

562 TUESDAY, *October 3rd*, 1899—One o'clock p. m.

The parties met pursuant to adjournment.

Present: The same as before recess.

The examination in chief of the witness GEORGE C. DUY was resumed, as follows:

By Mr. KETCHAM:

90 Q. Now, Mr. Duy, have you before you, the minutes of the company, with respect to the dividends of April, 1864?

A. Yes sir.

91 Q. Will you give us the book and the page?

A. Record No. 2, page No. 16.

92 Q. The date of the meeting was April 6th, was it not?

A. April 4th; it is dated one place April 5th, and another place April 4th, on the same page.

93 Q. Is this the meeting at which the dividend was declared?

A. This is the twenty-five per cent. dividend you are talking about?

94 Q. Yes sir.

A. Yes sir, it was.

95 Q. What is the date, now, April 4th or 5th?

A. That is under the leading date of April 4th—I don't know—it seems to be headed Tuesday, April 5th, 1864. Shall I read it?

96 Q. Yes sir.

A. (Reading:) "On motion it was ordered that in consideration of the receipts of the company having been applied to and used in erecting bridges, re-laying track, constructing side track, purchasing new material, the equipment and the necessary expenses,
563 which have been charged to earnings, the capital stock therefore be increased twenty-five per cent. to cover such expenditures.

It was moved by Mr. Rose to make the resolution read "twenty" instead of "twenty-five per cent."

Not carried.

Mr. Rose then moved the passage of the original resolution, which was adopted, all the members present voting in the affirmative, excepting Mr. Farrington, who voted no.

It was ordered that the increase of twenty-five per cent. on the capital stock be made to the stockholders registered on the books of the company on the 9th of April, full shares to be issued and fractions paid in cash."

And then there follows a description of how the eastern and western stockholders were paid.

96 Q. Now, I wish you would turn to Ledger B, under the head of capital stock, date April 9th, 1864, and give in detail the ledger entry, with respect thereto. What is the page, Mr. Duy?

A. It is Ledger B, page 123.

97 Q. What is the entry?

A. It is dated November 30th, 1864.

98 Q. Or April 9th, 1864?—The entry in regard to the $376,700 increase of capital stock?

A. On the credit side, April 9, 1864, by construction account 144, (meaning journal page 144) $376,700.

99 Q. That is the entire entry?

A. Yes sir.

564 100 Q. After that entry was made what was the total of the capital stock account?

A. $1,899,150.

101 Q. And prior thereto what was it?

A. $1,522,450.

102 Q. Now turn to Journal B, page 144. Give the master the corresponding journal entry.

A. It must be Journal C. This is 1857. (Referring to Journal C) Journal C, page 144, dated April 9th, 1864—Shall I read it?

103 Q. Yes sir.

A. (Reading:) "Construction account to capital stock, construction account, posted to page 2, capital stock posted to page 123. The entry 'For twenty-five per cent. increase made to stockholders by order of the board, April 5th, 1864, to all stockholders on the books April 9th, in consideration of a portion of the earnings having been used in permanent improvements on the road and purchase of additional equipment and machinery, capital stock, April 9th, $1,522,450, increase (twenty-five per cent.), $380,612.50, less fractions paid in cash, $3,912.50 (carried out) (debit and credit columns,) $376,700.'"

104 Q. So that by those entries it appears, does it not, that on the 9th of April, 1864, one-fourth of all the stock that had heretofore been outstanding had been added, except in the small amount of $3,912.50, which was paid in cash?

A. Yes sir.

105 Q. And that, included all the stock that before that time had been issued, no matter upon what consideration, or how that had entered into the capital stock account?

565 A. I judge so. I cannot answer that positively without running back through the capital stock account to see if there was any credits.

106 Q. I will put it then, all the net capital stock.

A. Yes sir.

107 Q. Now, I wish you would turn to the entry on Ledger B, page 88, I think it is, and I will get you to say if you can find under date of November 30, 1856, any item of stock issued on that day, and if so what is the entry in regard to it?

A. I find one.

108 Q. What is the entry? Give us book and page.

A. It is Ledger B, page 88. Capital stock accout. On the credit side, "November 30, 1856, by stock dividend 112 (meaning journal page) $211,600."

109 Q. Now, look at page 112, Journal B, and see what the corresponding entry in the journal is, on that subject?

A. Journal B, page 122, "Stock dividend to sundries. To capital stock for amount of stock, stock issued." On the debit side, $211,600. To dividend account, fractional dividends, payable in cash, $4,970. On the credit side, $216,570.

110 Q. Now, turning to the ledger, I will get you to state, after the $211,600 of stock was issued, what was the aggregate amount of stock outstanding at that time?

A. $1,294,450.

111 Q. What are you reading from?

A. Ledger B, page 88.

112 Q. And prior to that time what was the amount of the capital stock outstanding?

A. $1,082,850.

113 Q. What is that from?

566 A. The same page.

114 Q. Now, to what other account in the book, on the ledger beside the capital stock account, was this $211,600 carried?

A. The whole amount $216,570 was carried to the account of stock dividend on Ledger B, page 99.

115 Q. And where did it come from?

A. It came from the original entry on the journal, page 112.

116 Q. What account on the ledger?

A. It came directly; it is a new account, opened on the journal, page 112. Stock dividend is debited and capital stock and dividend account are credited on the ledger.

117 Q. Now, where does the stock dividend account come from?

A. It comes from the journal, on the debit side of stock dividend, and it is credited off by profit and loss.

118 Q. It goes then, ultimately through the profit and loss account, does it not?

A. Yes sir. There is the journal entry, on page 112, carrying it out.

119 Q. And what is the journal entry with respect to that?

A. Profit and loss account, debtor to stock dividend for twenty per cent. dividend declared on the capital stock, registered on the books, November 30, of which fractions are to be paid in cash, $216,570.

120 Q. Now, what is there upon the journal or ledger, if anything, to indicate that on that day, or at that time, as a part of that transaction, either the $211,600 or the $216,570 had to come to the company in cash?

A. There is nothing in these entries to indicate any cash about it. Nothing.

567 121 Q. Now, what is there with respect to the dividend of $376,700 to indicate that at that time, or as a result of that transaction, any cash had come to the company from persons buying its stock?

A. Nothing.

122 Q. I will ask you this general question. Now, is it not true with respect to both of these entries, the entry of April 1864 and the entry of November, 1856, that they indicate that on those respective dates there were dividends declared and paid, in the first instance of twenty per cent., and in the second instance of twenty-five per cent., upon all capital stock that up to the payment of that stock dividend had been outstanding?

A. Yes sir.

123 Q. And that in return for the dividends so made no stockholder, or other person, at that time, and as a part of that transaction, gave any consideration of money to the company for the stock received upon those dividends?

A. There are no such payments indicated.

124 Q. I will ask you if you have a typewritten copy of the

original statement No. 11, concerning which you have been examined?

A. Yes sir.

125 Q. And if so, will you produce it, and hand it to the reporter that he may designate it as Exhibit No. 9.

A. I have it; it is here.

Mr. KETCHAM: I will offer that in evidence.

568–578 The statement, being Mr. Duy's statement No. 11, was admitted in evidence, and marked by the reporter "Exhibit No. 9, October 3, 1889, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

579 126 Q. Now, I will get you to state what change, if any, in the construction account subsequent to April 9, 1864, as it appears upon the ledgers of the defendant company there was up to and including the 17th day of January, 1873?

A. There was no change at all; it remained the same.

By the MASTER:

127 Q. I understand you to say there wasn't any?

A. No change.

By Mr. KETCHAM:

128 Q. I will ask you to state if you have prepared a statement or schedule giving a summary of the construction account as you have heretofore given in detail?

A. Yes sir.

129 Q. Showing by the periods the amount expended and the amount charged to the various items?

A. Yes sir, showing the aggregate each year, and the total.

130 Q. Showing the aggregate and the totals?

A. The general totals, the grand totals.

131 Q. I will ask you if you have prepared a typewritten statement of that, and if so please produce it.

A. I have it.

132 Q. Please hand it to the reporter and let him designate it as Exhibit No. 10.

A. I have done so.

Mr. KETCHAM: May it please the master, I will introduce that in evidence.

580 & 581 The statement, being Mr. Duy's statement No. 11–A, was admitted in evidence and marked by the reporter "Exhibit No. 10, October 3, '99, W. S. G.," the same being in the words and figures following, to wit:

(See next page.)

582–614 WITNESS: I want to correct the statement that I made a while ago that the construction account was not changed

subsequent to April 9, 1864, up to and including the 17th day of January, 1873. The construction account remained the same until November 30, 1872, without any change, and then it was transferred to another account.

133 Q. Now, I will get you to state if you have prepared an exhibit showing the entire capital stock account of the defendant road from the beginning to 1873?

A. I have prepared a statement showing the capital stock account from the beginning, the last credit being July 1, 1868.

134 Q. How far down does that extend?

A. That is all there is of it, so far as I recollect now.

135 Q. Have you prepared a typewritten copy of that statement and if so, will you produce it, and hand it to the reporter? And I will ask him to identify it as Exhibit No. 11.

A. I have done so.

Mr. KETCHAM: I desire to introduce that in evidence.

The statement, being Mr. Duy's statement No. 39, was admitted in evidence and marked by the reporter, "Exhibit No. 11, October 3, '99, W. W. G.," the same being in the words and figures following, to-wit:

(See next page.)

615 136 Q. Now, in these various exhibits that you have heretofore produced, and that you have been enquired of concerning, I notice that the items upon each of them, or a number of them, are items of interest and discount. I will ask you to refer to exhibit No. 10, and I will get you to state what was the net amount of discount and interest that was charged to construction account up to and including the 30th day of November, 1856.

A. The net discount was $96,913.36.

137 Q. And the net interest account?

A. The net interest is $52,664.22. The total is $149,577.58.

By Mr. WINTER: Is that what appears on the exhibit?

The WITNESS: It appears on my statement No. 11 and 11-A both.

138 Q. Now, these items of interest and discount represent what?

A. They represented interest paid on borrowed money and discount on stock and bonds sold.

139 Q. And that went where?

A. It was charged first to interest account and discount account, but was subsequently charged to construction account.

140 Q. And they are included in the item, in the aggregate that you have heretofore given as $1,611,450?

A. Yes sir.

141 Q. They are all itemized on the various exhibits that have gone in in connection with construction?

A. Yes sir.

142 Q. Now take your statement No. 54. I will ask you
616 to state whether you have made out a statement of the different bonds that were issued by the Terre Haute & Indianapolis road from the beginning to the 30th of November, 1856, inclusive?

A. Yes sir.

143 Q. What does that statement show?

A. As to the amounts issued?

144 Q. No, what does the statement generally show as to the bonds issued and the disposition of them?

A. It shows the bonds issued and what became of them ultimately.

145 Q. Are you able to state from that, or *there* is there a summary on that which will show the number of bonds that were exchanged for stock?

A. Yes sir.

146 Q. How many of those entire bonds were exchanged for stock?

A. Do you want the two issues divided?

147 Q. No, I do not care about that, because the statement itself would show the details of it.

A. $648,000.00 converted into stock.

148 Q. Was it not $650,000.00?

A. No, there was $480,000.00 at six per cent. $648,000.00. Of these $30,000.00 were paid March 29th, 1866; $18,000.00 were paid June 16th, 1866; $2,000.00 were paid August 23rd, 1866, and were held by the company until November 20th or 30th,—I don't know which it is—1866, and stock was then issued to Chauncey Rose, as trustee.

149 Q. That is to say, if I understand you, the road in the course of its business paid $50,000.00 of its bonds in March, June and
617 August of 1866, and after they had been cancelled and surrendered, the following November a like amount of stock was issued to Chauncey Rose as trustee, and thenceforward held in the treasury of the company as treasury stock.

A. Yes sir.

150 Q. Now in addition to that state whether——

A. In addition to that there was stock issued, of that $648,000.00 there was paid $5,000.00 of the stock issued for five (5) $1,000.00 bonds supposed to have been lost, that never were presented for payment, occur-ed in 1868; that stock was issued to Chauncey Rose as trustee and credited to profit and loss account.

151 Q. And remained in the treasury of the company?

A. It remained on the books of the company in the name of the trustee.

152 Q. You may state whether after that time dividends were paid upon this $55,000.00 of stock?

A. Dividends were paid right along on dividends days.

153 Q. What was done with the dividends?

A. Went into the earnings of the company, credited either to surplus or profit and loss account, I don't know which.

154 Q. Have you a typewritten copy of this statement and if so

will you produce it and hand it to the notary and let him identify it as Exhibit No. 12?

A. I have and do so.

Mr. KETCHAM: I will offer this statement, Mr. Duy's No. 54, in evidence.

618–631 The statement, being Mr. Duy's statement No. 54, was admitted in evidence and marked by the reporter "Exhibit No. 12, Oct. 3, '99, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

632 155 Q. I wish you would turn now to Ledger A at page 59. What do you find at page 59, Ledger A with respect to these bonds?

A. What date?

159 Q. That is the only reference I had. See what you find on page 29, Ledger A.

A. That is the six per cent. bond account.

160 Q. That is the page of the ledger giving the history of the six per cent. bonds included in this statement that has just been introduced in evidence.

A. Yes sir, that page and page 106.

161 Q. Are you able to state at what time such of these bonds as were not six per cent. bonds as were not surrendered for stock, had been paid by the company?

A. I will have to have that detailed account (referring to statement No. 54). We haven't got anywhere the amount of issue. There will be trouble to make a balance after awhile.

162 Q. How many bonds in all were there issued?

A. Of the six per cent. bonds there were issued $75,400.

163 Q. Now of the seven per cent. bonds how many were issued?

A. $600,000.

164 Q. Making the total issue of both sets of bonds $675,400?

A. Yes sir; of the six per cent. bonds there was surrendered for stock $48,000. There is an entry on Journal A, page 313, December 26, 1854, which recites the exchange of $20,000 of those bonds for a note of the company.

165 Q. Payable to whom?

A. Payable to Indiana Asbury university, dated January 1st, 1854, at twelve months, guaranteed by various individuals,

633 and the same journal and page at the same date recites payment of $4,700; and the next page the payment of $1,000 December 30th, and the same day the payment of $600, and the same day the payment of $1,100, making $7,400.

166 Q. So that, by the 31st of December, 1854, the total issue of these bonds had either been taken up by stock or had been paid, except in the case of the Asbury university where a note had been given for $20,000 one year from the first of January, 1855?

A. Yes sir.

167 Q. Are you now able to state when that note to Asbury university was paid?

A. I did not make any statement of the bills payable account at all. It will take some time to run that down, if I can find it at all.

168 Q. Now, I will ask you if you have made an exhibit showing the amount of the discount account?

A. Yes sir, that is statement No. 36. This is the discount account from 1849 to 1852, inclusive.

169 Q. The last charge is December 15th, but the last credit is the 31st?

A. Yes sir, it means the whole year.

170 Q. Now, if you have prepared a correct typewritten copy of the statement, I will ask you to produce it and hand it to the reporter to be identified as Exhibit No. 13.

A. I have it and I hand it to the reporter.

Mr. KETCHAM: I offer this statement in evidence, may it please the master.

634–642 The statement, being Mr. Duy's statement No. 36, was admitted in evidence and marked by the reporter "Exhibit No. 13, October 3rd, '99 W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

643 171 Q. I will call attention to the note on page 4 of this Exhibit 13, to the explanation in the note, and I will get you to explain to the master how this discrepancy in the figuring arose, and what the explanation is.

A. I do not know that I can make that any plainer than the note itself.

172 Q. I understand that. I simply want you to swear to the note. The other comes from the books, and this is an explanation.

Mr. PICKENS: Don't the note explain itself?

The WITNESS: It is my note of what the books show. In the recapitulation on the last page of the capital stock account, (which has already been introduced) the total of discount on stock is only $16,475, while in this account the amount is $18,100, showing a difference of $1,625. This is accounted for by the fact that in some cases the treasurer is charged and capital stock is credited with the full amount of the face of the stock sold, and the treasurer is then credited and the discount account is charged with the difference; and in such cases the amount of discount does not show in the capital stock account. See Journal A, page 13, $95, page 99, $200, and so forth, the items which make up the difference.

173 Q. That explanation of the difference of $1,625 is not simply your statement of it, but it is taken from the books, as referred to in the note?

644 A. You will find those items there which make the difference I can tell when that Asbury University note was paid now.

174 Q. If you have any entry on the book there to which you can point, showing when the note given Asbury university was paid, I wish you would produce it.

A. Journal B, page 80, July, 1856, there is an entry "Sundries debtor to treasurer," the first item of which is "Bills payable, Indiana Asbury university, $20,000."

175 Q. What is the date?

A. July, 1856.

176 Q. What was the date in July?

A. It don't give it.

177 Q. So that it is true, is it not, that prior to the first of August, 1856, of all the two issues of bonds, six and seven per cent. bonds, that were outstanding at any time, they had all been paid by the company with the exception of those bonds which were afterward surrendered and stock taken in lieu thereof, including the $50,000 that had been paid by the company and subsequently converted into stock in the name of Chauncey Rose, trustee?

A. Yes.

178 Q. And it is true, is it not, that so far as the $5,000 of bonds that were on the statement No. 54, Exhibit No. 12, as having had stock substituted for them, they were never, in fact, paid or surrendered to the company so far as the books disclose?

A. Not within the time embraced in our examination.

179 Q. You are not undertaking to show what has happened since 1873?

A. No sir.

645–650 180 Q. Have you made any statement as to the investment by the defendant company in the stock and bonds of other roads?

A. Yes sir.

181 Q. I will call your attention now to statement No. 37, and ask you to state to the master whether or not that is a statement of the transactions of the defendant company in the stock of the Evansville & Crawfordsville Railroad Company?

A. It is.

182 Q. What was the total amount of that investment?

A. The total investment made by the company was $63,415.89.

183 Q. Have you prepared a typewritten copy of that statement?

A. Yes sir.

184 Q. I will get you to hand it to the reporter for designation as Exhibit No. 14.

A. I have done so.

Mr. KETCHAM: I will offer this statement marked Exhibit No. 14, in evidence.

The statement, being Mr. Duy's statement No. 37 was admitted in evidence and marked by the reporter "Exhibit No. 14, Oct. 3, '99, W. S. G.," the same being in the words and figures following to-wit:

(See next page.)

651–655 185 Q. Now, have you a statement of the Evansville & Crawfordsville Extension bonds?

A. I have.

186 Q. What was the total investment in the Evansville & Crawfordsville bonds?

A. That investment is $94,950.

187 Q. Have you a typewritten copy of that statement?

A. Yes sir.

188 Q. If so, will you produce it and give it to the reporter to be marked Exhibit No. 15?

A. It is statement No. 41; the reporter has it.

Mr. KETCHAM: I will offer that in evidence.

The statement, being Mr. Duy's statement No. 41, was admitted in evidence and marked by the reporter "Exhibit No. 15, October 3, '99, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

656–659 189 Q. I will ask you if you have prepared a statement in regard to the transaction of this company in the bonds of the Cincinnati & Indianapolis Railroad Company, and if so please state what the amount of that investment was.

A. I have. It amounted to $50,000.

190 Q. If you have a typewritten copy of that statement, will you produce it, and hand it to the reporter and let him identify it as Exhibit No. 16?

A. It has been done.

Mr. KETCHAM: I will offer this statement in evidence.

The statement, being Mr. Duy's statement, No. 43, was admitted in evidence and marked by the reporter "Exhibit No. 16, October 3, '99, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

660–668 191 Q. If you have prepared a statement of the investment of this company in the bonds of the Terre Haute, Alton & St. Louis Railroad Company, you may state, and give the amount of such investment.

A. It will take some time to do that. I have prepared a statement of the transactions with the Terre Haute, Alton & St. Louis Railroad Company from November, 1867 to December, 1863. It will take some figuring to get at the amount invested. It was an original amount and then it was notes and went into judgment and finally into bonds.

192 Q. What was the final investment in bonds?

A. The investment in the bonds $94,552.29, I think.

193 Q. And the details of it are shown in the statement?

A. Yes sir.

194 Q. If you have prepared a typewritten statement of that——

A. I suppose that covers some interest accrued in the judgment.

195 Q. Whatever it covers will be shown by the detailed statement?

A. Everything is here in the itemized statement.

196 Q. If you have prepared a typewritten copy of it, please hand it to the reporter for identification as Exhibit No. 17.

A. I have done so.

Mr. KETCHAM: I will introduce that in evidence.

The statement, being Mr. Duy's statement No. 38, was admitted in evidence and marked by the reporter "Exhibit No. 17, Oct. 3, '99, W. S. G," the same being in the words and figures following to-wit:

(See next page.)

669 197 Q. If you have prepared a statement of the transactions of the defendant company in the various bonds of the St. Louis, Vandalia & Terre Haute Railroad Company, and its stock, you may state, and what the extent of that investment was in each set of securities.

A. I have such a statement.

198 Q. What does that statement cover?

A. The load account which is closed by a credit of $200,000, second mortgage, seven per cent. convertible bonds of the St. Louis, Vandalia & Terre Haute road, and there is an investment of $2,000 in the first mortgage, thirty year, seven per cent. bonds, and there was an investment of $360,000 seven per cent. second mortgage guaranteed bonds, and there was $161,700 seven per cent. income bonds; and this statement shows the amount of income derived from those bonds, show a further investment of $265,000 in the stock of the road.

199 Q. What was the total investment in the stock and bonds?

A. I have not got it.

200 Q. I have got it down here as $988,700.

Mr. WINTER: That is correct.

202 Q. Have you followed the footings, Mr. Duy, or will you make them?

A. $988,700. Yes sir, that is right.

203 Q. Those appear on statement No. 50 and 53, do they?

A. No. 50, the statement there on the last page, on 50; I don't know whether you want to offer it, or not. That state-
670–681 ment on the last page of No. 50, do you want that to be offered?

204 Q. Pages 4 and 5 show the amount received?

A. Yes sir.

205 Q. Now if you have prepared a typewritten statement of these transactions, I will get you to hand it to the reporter and let him identify it as Exhibit No. 18.

A. I have done so.

Mr. KETCHAM: I will offer that in evidence, if the master please.

The statement being Mr. Duy's statement No. 50, was admitted in evidence and marked by the reporter "Exhibit No. 18, October 3, '99, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

682 206 Q. I will call your attention to an investment in the bonds of the city of Evansville, and with reference to that, the Minute Book 2, at page 109, and Journal D, at page 170.

A. Page 109 appears to be a letter from John Ingalls, Jr., to William R. McKeen, president.

207 Q. And what is John writing to Mack?

A. It is pretty near a page.

208 Q. What is the date?

A. The date of the letter is June 19, 1868.

209 Q. Let us see what the entry is in the Journal D, page 170, if that will simplify the thing.

A. This is in relation to that matter. Journal D has not been brought over.

210 Q. We will pass Journal D then for the present, and pass that, and go to the Evansville & Terre Haute—that is worse yet, that is the E. and C.; we will have to pass them too, because they have not come over yet. Look at statement 42, and see if we can get into that. If you have any account of the investment of this road in the bonds of the Madison & Indianapolis Railroad Company, you may state, and if so, what the extent of the investment was.

A. The original investment there seems to be $2,230.

211 Q. Was not the original investment there $1,600?

A. Yes, $1,600 was the original investment in 1856.

212 Q. The original investment there was $1,600?

A. Yes sir.

213 Q. Now, if you have a typewritten copy of that statement you may produce it and hand it to the reporter and let him identify it as Exhibit No. 19.

A. I have done so.

683–685 Mr. KETCHAM: I will introduce this statement in evidence.

The statement, being Mr. Duy's statement No. 42, was admitted in evidence and marked by the reporter "Exhibit No. 19, October 3, '99, W. S. G.;" the same being in the words and figures following, to-wit:

(See next page.)

686 214 Q. Now, turn to Journal C, page 107.

A. I have it.

215 Q. What is the amount there? $100,000?

A. Yes sir.

216 Q. Government bonds?

A. Yes sir.

217 Q. Read the entry there.

A. "December 14, 1863, U. S. 5:20 bonds, treas. For amount paid to E. J. Peck, president, for purchase of bonds, voucher, October 26, $100,000, debit and credit side." It gives a description of the bonds also.

218 Q. I do not care about that. The entry is treated as in. Now go to page 485, an item of $5,000 on account of Union Star Line stock.

A. December 30, 1865. Sundries to M. M. Landis, stock, Union Transportation and Insurance Company, for fifty shares (50), at $100 per share, $5,000.

219 Q. Where does that entry go to in the ledger?

A. That goes to page 427.

220 Q. Have you got the ledger there? What account is it entered in?

A. Stock, Union Star Line. That is the debit side; it goes through the credit side, goes to Mr. Landis' account credit.

221 Q. Was that stock carried on the books under that designation, or did it go into the profit and loss or surplus account?

A. It was carried on the books just as it is, stock Union Transportation Company.

222 Q. In what account?

A. Star Union Transportation Company.

687 223 Q. It was carried as an asset in that account; it did not go into the surplus or profit and loss or any other general account?

A. I think it was carried in that name until it was ultimately sold.

224 Q. Now, look at Journal C, page 579, bonds of the city of Indianapolis, $3,000. It is charged to Indianapolis city bonds, and credited to bills receivable, and the bills receivable were city warrants which were exchanged for these bonds.

225 Q. Now, go to Journal C, page 587, $50,000.

A. That is November, 1866.

226 Q. What date in November?

A. There is no date given on that page. It is the 30th I guess. The last date I see is November 30th, 1866.

227 Q. And what was the transaction?

A. Terre Haute & Indianapolis Railroad Company to capital stock, for fifty of the company's seven per cent. bonds due on the 1st of March, 1866, numbers as above, paid out of the surplus account. The same is converted into stock, stock and bonds, representing the cost of the road. Fifty bonds of $1,000 each, amounting to $50,000. Certificate No. 13, for 1,000 shares of stock. See folio 471, 511 and 540.

228 Q. That is the same $50,000 of stock that you were inquired of earlier in the afternoon with respect to the paid bonds of the company?

A. Yes sir.

229 Q. That went to Rose, as trustee.

A. Yes sir, the reference to pages 471, 511 and 540 show where they were paid.

688 230 Q. Now, Mr. Duy, turn to page 170 of Journal D, and see if you find any explanation there of investment of $42,500, in something.

A. Journal D, page 170, July 1st, 1868, Evansville city bonds, to treasurer. Fifty Evansville city bonds of $1,000 each, giving the numbers and where payable, taken at .85 by order of the board, passed June 24th, 1868, $42,500.

231 Q. Now turn to Journal E, page 184. That is about $50,000 of Evansville, Terre Haute & Crawfordsville railroad stock, August 14th, 1872.

A. August 13th, 1872. No, it is August 14th, 1872. Evansville, T. H. & Chicago Railroad Company current account, for certificate No. 117, one thousand shares of capital stock of said company $50 a share, $50,000.

232 Q. What is the entry in Ledger C, at page 508, with respect to that? I suppose that is just the ledgerizing of that journal entry, probably.

A. Yes sir, stock is charged.

By Mr. WILLIAMS:

233 Q. What is it charged?

A. Evansville, T. H. & Chicago railroad, and credited to E. & T. H. current account. Just closing the current account by the transfer of the stock account.

By Mr. KETCHAM:

234 Q. The reference in that journal *in* to Ledger C, page 580, is it?

A. 508, current account, and the stock account is page 24.

689 232 Q. Have you got Journal D in front of you?

A. Yes sir.

233 Q. Turn to page 54. I want to inquire, at that page, in regard to a little item of $316,297.50?

A. Page 54, Terre Haute, June 29th, 1867, Terre Haute & Indianapolis Railroad Company stock to treasurer, for 3495 shares purchased at $90.50/100 per share, per order of the board of directors, see record dated June 18th, 1867; $316,297.50, debit and credit columns.

234 Q. What was $1.81 that was paid for those shares?

A. Par was fifty dollars.

235 Q. Now, go to page 55, an item of $117,650?

A. That is dated July 6th, 1867, page 55; Terre Haute & Indianapolis R. R. Company stock account to treasurer, for 1300 shares, by F. Bronson, from G. W. Hall, at ninety and fifty one-hundredths dollars per share, per order of the directors, see record, dated June 18th, 1867; $117,650; both columns.

236 Q. Now, page 62, a small item?

A. July 25, 1867; Terre Haute & Indianapolis Railroad Company stock; to profit and loss for two shares of stock of this company, standing on the books in the name of William P. Hadley, Hendricks county, Indiana; the same is this day transferred to this account of the T. H. & I. Company, believing the same to be an error and no such man as W. P. Hadley exists; two shares, par value $50 each, $100.

237 Q. Page 96, an item of $97,287?

A. November 18, 1867, Terre Haute & Indianapolis Railroad Company stock to treasurer, for 1075 shares, purchased from
690 Frederick Bronson, New York, at ninety and 50/100 per share, per order board of directors, dated June 18, 1867, $97,287.50; that is on page 96.

238 Q. Page 97; I presume that is the five thousand lost bonds isn't it?

A. Page 97 is a transfer from Chauncey Rose, trustee.

239 Q. A transfer of what?

A. Stock.

240 Q. Read the entry.

A. November 30, 1867, Chauncey Rose, trustee, debtor to Terre Haute & Indianapolis R. R. Company stock for amount transferred to C. Rose, as trustee, by order of the board of directors, November 30, 1867; see record: folio 82, $581,335.

241 Q. That is the footing of these four last above amounts, isn't it?

A. Well, I don't know; I didn't take them down—Yes, that is right; $581,335, is the summary of the five amounts that I have given you before.

242 Q. Now, go to the journal, page 171—you have it there in front of you.

A. Yes, I have it.

243 Q. Is that the five thousand lost bond transaction?

A. Yes.

244 Q. Read it.

A. July 1, 1866, Chauncey Rose, trustee, to profit and loss, May 30, 1868, for this company's seven per cent. bonds Nos. 381, 382, 383, 384 and 385, due on the first day of March 1866, and not having been presented for payment up to this date, are supposed to have been lost, the same has been converted into the capital stock
691 of this company, certificate No. 87, dated May 30, 1868, one hundred shares in the name of Chauncey Rose, trustee, and credited to the profit and loss account, par value of a hundred shares five thousand dollars, add premium on the same, being fifty per cent. above par, making present market value seventy-five dollars a share, total credit to profit and loss, $7,500.

245 Q. Now go to Minute Book No. 2, page 32; that is the reference in the above journal entries.

A. Record two, page 82; November 30, 1867. It is hereby ordered that the president of this company transfer the property in the

shares standing on the books of this company in the name of said company, to Chauncey Rose, as trustee, to be disposed of for the benefit of the corporation, or the stockholders of this company, such disposition subject to the approval of board of directors of this company.

246 Q. Now, I will ask you to state, if you have made a statement showing the entries upon the books, and the entries including the minute books, with reference to the transactions of the company in its own stock, and the disposition of the dividends therefrom?

A. Yes sir, I have.

247 Q. If you have made, or have typewritten copy of that I will ask you to produce it and hand it to the reporter and let him mark it as Exhibit No. 20—This is statement No. 46 and Exhibit No. 20.

A. I have done so.

692–704 Mr. KETCHAM: I offer this in evidence.

The statement, being Mr. Duy's statement No. 46, was admitted in evidence and marked by the reporter "Exhibit No. 20, Carpenter, Rep." The same being in the words and figures following, to-wit:

(See next page.)

705 248 Q. Now, turn to Minute Book No. 2, page 72—Have you anything there with reference to this stock transaction?

A. Yes sir, there is a good deal here.

249 Q. Well read it all.

A. (Reading:) June 18, 1867,——

250 Q. What is the page of that, of the preceding meeting?

A. That is page 70.

251 Q. I want this whole transaction.

A. Page 70. (Reading:) Terre Haute, June 11, 1867. In view of the subject under consideration the following preamble and resolution were unanimously adopted: Whereas certain parties are now in the city of New York endeavoring by unfair representations to induce the stockholders at the said city, to dispose of their stock in the Terre Haute & Indianapolis railroad, at a price much less than its actual value, so that said parties may obtain a majority of the stock of said company to control the same; Resolved, That W. R. McKeen, a stockholder and director, be and he is hereby appointed on behalf of this board to visit the stockholders resident at the said city of New York, to make known to them facts and advise what, in our opinion is the interest of said company; Resolved, That the directors view with deep regret the conduct of E. J. Peck, the president of this company in relation to inducing stockholders to dispose of their stock, the same being against the known wishes of the board, against the interests of the company and of such stockholders, and his never having presented the subject to this board, or to a

706 meeting of stockholders, and that Mr. W. R. McKeen be requested to go and call upon said E. J. Peck and make known to him this unanimous wish of the company, that he resign the

position he holds as president, without delay; Resolved, That Mr. McKeen is hereby instructed to request the stockholders residing in New York to appoint a committee of their own number to visit Terre Haute and examine into the affairs of this company, its value, etc., before disposing of the valuable interests they hold in the said road; Resolved, That the secretary be instructed to present Mr. McKeen and Mr. Peck each with a certified copy hereof. Also the following resolution was presented and unanimously adopted: Resolved, That the secretary be directed to send the Government 5–20 bonds to the address of W. R. McKeen, care of Frederic Bronson, No. 50 Wall street, New York, to be disposed of by Mr. McKeen as he deem to the best interest of the company, and to deposit proceeds, one-half with the Third national bank, New York, and one-half with the Farmers' Loan and Trust Company of New York. There being no further business on motion the board adjourned.

252 Q. Now, go to the meeting of June 18, 1867.

A. On June 18, 1867, I find the following: (Reading:) June 18, 1867, the following communication was laid before the board: "To the board of directors of the Terre Haute & Indianapolis Railroad Company, Gentlemen: In accordance with your request I herewith furnish my resignation as president of the board of directors, also my resignation as a director in said company, to take
707 effect on this date. Very respectfully, E. J. Peck. January 17, 1867. I am not guilty of the charges you prefer. I think your resolutions are unjust and severe. The resignation of E. J. Peck as president was accepted; also his resignation as director was accepted. Mr. McKeen laid before the board the following copy of an agreement made with the parties therein named, for the disposition of the stock respectively held by them to this company; "We, the undersigned, stockholders Terre Haute & Indianapolis R. R. Company, hereby agree to sell to the said railroad company the number of shares of said stock held by us set opposite our respective names, at the rate of one hundred and eighty-one per cent., to be paid for on delivery of our stock, say within ten days from this date, and said railroad company hereby agrees to purchase said stock on said terms, as evidenced by the signature of W. R. McKeen, Esq., a director of said road. New York, June 15, 1867." Do you want the names and number of shares?

253 Q. No, I don't care for that.

A. Then follows the names and the number of shares each.

254 Q. Do you know how many those shares were? Have you footed them up? If not, I wish you would do so. You had better read it, so that the reporter will have it.

A. (Reading:) J. O. Jones, 400 shares; J. Q. Jones, attorney for M. S. Jones, 25 shares; Authur U. Gifford, 375 shares; John Ferguson 737 shares; John Ferguson, attorney, (conditional) 702 shares; Frederick Bronson, 1075 shares; Jordan L. Winthrop, per
708 F. Bronson, attorney, 275 shares; A. F. Curtis, per F. Bronson, attorney, 228 shares (It has been, originally, the "8" is marked out, and a pencil mark of 9 over it); Oliver Bronson,

225 shares; Charlotte Brinkerhoff and Louisa Trup, per F. Bronson, attorney, 50 shares; Frederick Bronson, executor of A. B., 150 shares; George Hall 1300 shares; Robert Goelet 406 shares; Peter Goelet, 406 shares; Roosevelt & Son, 217 shares; W. R. McKeen, for the Terre Haute & Indianapolis R. R. Company, 702 shares, conditionally subscribed by Mr. Ferguson, to be accepted or not at the option of the Terre Haute & Indianapolis Railroad Company. It was ordered that the purchase be confirmed and that W. R. McKeen be authorized and empowered to place in the hands of Frederick Bronson, at No. 50 Wall street New York, fund to pay for same when respectively transferred to this company, as per said agreement. It was ordered that the 702 shares subscribed by John Ferguson, attorney, that when advised of the consent of the party or parties owning same, to transfer them that this company will then decide whether the 702 shares shall be accepted, or not. Mr. McKeen reported that the one hundred U. NS. 5-20 bonds, amounting to one hundred thousand dollars, that the board authorized him to dispose of as he might deem to the best interests of the company, that he had disposed of said bonds for $110,000, and had left the proceeds in the hands of Frederick Bronson, temporarily, subject to order, said Bronson having sold the same. The acts of Mr. McKeen were confirmed and approved with relation to the sale of said bonds and the disposition of the proceeds thereof. On motion William R. McKeen was elected president of the Terre Haute & Indianapolis Railroad Company, vice E. J. Peck, resigned. On motion board adjourned. See Rose, president pro tem.

709

255 Q. Now, I wish you would go to Journal D, page 114,

A. Journal D, page 114, November 30, 1867.

256 Q. Just read the entry.

A. Profit and loss, to sundries, for deductions made on the following items, by order of W. R. McKeen, president, being the difference between the amounts paid and charged on the books, and the market value at the present time.

There are quite a number of items among the- Chauncey Rose, trustee, charged on books, $581,335, 6782 shares held by the company at $75.00 per share, $515,400, charged to profit and loss, $65,935. That is all that refers to this matter.

257 Q. These shares of stock?

A. Yes sir.

258 Q. That list of shares of stock foot up 6872, don't they?

A. Yes, that is right.

259 Q. That is to say, Mr. Duy, that in June 1867, the road disposed of one hundred thousand dollars of its Government bonds, at one hundred and ten thousand dollars, that is, the hundred thousand dollar Government bonds that have been referred to in the evidence, is it not?

A. Yes sir.

260 Q. And with $421,235 of the other moneys of the company

had purchased the holdings of stock down in New York,
710 aggregating 6872 shares, amounting to $531,235, and that at the close of that fiscal year, namely, on the 30th of November, 1867, the difference between the price which was paid, ninety and a half—one eighty-one, and one fifty, the price stated to be the value, was charged to profit and loss, amounting to $65,935?

A. I am not sure that you have got that right; I would like to see that statement. (Witness examines paper.)

261 Q. (Question No. 260 read to the witness.)

A. That is right.

262 Q. Does it appear from the records of the company, from your examination, referring to the entry of June 11, 1867, that there were any other stockholders residing in the city of New York, whose stock persons were endeavoring by unfair representations as to its value, to purchase at a price which was much less than its actual value than the stockholders whose stock was purchased, as shown in the proposition submitted to the company on the eighteenth of June.

A. I do not find the names of any of the stockholders given, as being operated upon.

263 Q. Do the records of the company show who, at any time, were the holders of its stock.

A. Not in this minute book.

264 Q. But are there any records of the company from which you can ascertain?

A. The stock ledger ought to show the names of all stockholders at that date.

265 Q. Have you got the stock ledger?

A. Yes sir, it is up at the office.

711 266 Q. I wish you would investigate, as you can, to ascertain whether there were any other stockholders in the company in June, 1867, residing in New York, than those named in the proposition presented by Mr. McKeen?

A. All right, I will do so. That is quite a little job.

267 Q. Now I wish you would look at Minute Book 2, page 84, and state what reference there is there to the transaction of $13,200?

A. Record 2, page 84. That is the meeting of December 24, 1867. The treasurer reports assets and liabilities as follows: Among the items are the following:

Mr. WILLIAMS: I would like to have it in full.

A. (Reading:) To balance, per cash book, $260,146.49; December receipts to date, $19,609.11; by deposits, Farmers' Loan and Trust Company, New York, $44,876.24; ditto, Third national bank, New York, $48,234.80; ditto, First, T. H. $40,199.35; ditto, National State bank, New York, $25,739.81; ditto Morgan & Deming, $78,627.87; ditto, Harrison's band, Ind., $11,148.03; ditto, December vouchers, $949.75; by T. H. & I. R. R. Company stock purchased $13,200; by cash advanced to B. Davis, $3,275.21; by cash items, $13,504.54; the footings of both debit and credit are $279,755.60.

268 Q. In his report for the next quarter in March 1868, I will

ask you if that stock reported on hand, appeared still to be on hand, and if not, what explanation of its disposition is made?

712–731 A. The report filed March 30, 1868, does not contain that stock as an asset; it is not mentioned.

Mr. PICKENS: What page is that last report on?

The WITNESS: That is page 105.

269 Q. Do you find any entries on the books, between December and March, showing what disposition was made of it?

A. No sir, I find no entry at all, other than that one referring to that matter.

270 Q. Now, I will ask you, if you have prepared from the books a statement the reduction of surplus, etc., as taken from the books?

A. That is statement No. 44; yes sir, I have prepared a statement of that kind.

271 Q. Have you a typewritten statement of that? If you have, please produce it and hand it to the reporter to be identified and marked Exhibit No. 21.

A. Here it is. (Producing paper.)

Mr. KETCHAM: Now, I offer this in evidence.

The statement, being Mr. Duy's statement No. 44, was admitted in evidence and marked by the reporter "Exhibit No. 21/ Carpenter, Rep.," the same being in the words and figures following, to wit:

(See next page.)

The hour of five o'clock p. m., having arrived, the hearing was adjourned until to-morrow, Wednesday, October 4th, 1899, at 10 o'clock a. m.

732 WEDNESDAY, *October* 4, 1899—10 o'clock a. m.

The parties met pursuant to adjournment.

Present, the same as on yesterday.

The examination in chief of the witness, GEORGE C. DUY, was resumed as follows:

Questions by Mr. W. A. KETCHAM:

Q. Mr. Duy, I wish you would get your statement No. 44, and Exhibit No. 21, and explain in a general way the method of keeping the various accounts that are referred to in that exhibit and the effect that the various entries there referred to would have upon the apparent assets of the company as shown by the books after the entries had been made, or in any reports made up from the books after these charges had been entered. Take the machine shop account on page 1.

A. On the ledger, on the books of the company, taking the machine shop account as an example, the machine shop material account is charged from time to time with the materials bought, and at the end of the year credited, or at various times during the year cred-

ited with the material sold and used, and the balance to the debit of the machine shop account at the end of any given year, ought to represent the material on hand with such profits as had been made during the year, unless they are otherwise accounted for; at least that is the inference that we have drawn from the way the books were kept. I did not have the machine book before me,
733 and could not tell exactly. At a certain period, I think it would be December, 1856, the books show and the report shows a balance of material on hand of $61,604.31.

By Mr. HAWKINS:

Q. What is that date, Mr. Duy?

A. That is November 30, 1867. This amount is charged off to profits and loss with the explanation "For amount of material on hand at the machine shops, December 1st, 1867, heretofore included in the surplus account is deducted therefrom."

By Mr. WILLIAMS:

Q. Now, you say it is 1867?

A. December 1st, 1867. All this amount thus charged off to profit and loss does not appear in the printed statement as material on hand, as in each year before I think the material on hand in the machine shop had appeared as assets of the company.

Q. Which is it, November or December, 1867; you have given both dates.

A. The 30th of November or the 1st of December; there is only one day's difference.

By Mr. KETCHAM:

Q. What effect would that have upon a statement made or a published report made from the books of the company; would
734 it be to increase or diminish the apparent assets of the company?

A. It would diminish the apparent assets of the company by that amount, and also diminish the surplus account.

Q. Now, when next do you find an entry with respect to this item on the books, $61,604.31?

A. That item is charged back again to the machine shop one year from that date, November, 1868.

Q. So that, at that time it would appear that the assets had been increased by that amount?

A. Just charged back on the book and credited to profit and loss, or surplus, I don't remember which; it was put back into the machine shop account at the expiration of the year, and enters into and appears as part of the machine shop account for a day or two.

Q. And then what happens?

A. In the year 1868, the machine shop is charged with materials bought, $230,275.72, and also with the amount charged off to profit and loss the year before, transferred back again, $61,604.31, making a total debit that year of $291,880.03, and the account is credited

with a total of $239,672.99, leaving a balance on hand November 30, 1868, of $52,207.04; and this balance is again charged off to profit and loss and put back again in November, 1869, and so on.

Q. The account you say was credited with $236,672.99? How was that account credited with that amount? That was the amount that had been used during the year?

A. Materials sold and used, and credited off in various ways.

735 Q. Then what was done in the year 1869 with the machine shop account?

A. Not to go into the aggregates, which I suppose is not necessary, November 30, 1869, the balance was $68,690.40.

Q. What was done with that?

A. That was charged off to profit and loss at the close of the year, and on the same day charged back again to the new account—no, not the same date, the next year charged back again, just as it was before.

Q. What was the course during the next succeeding year?

A. At the close of 1870, the balance was $69,585.57, which is carried to Ledger C, and the balance of further charges of $2,995.75, leaving a balance December 1st, 1870, of $72,581.32, that is charged off to profit and loss November 30, 1870, and charged back again to machine shop account November 30, 1871.

Q. What was done in the year 1871?

A. In the year 1871 the balance of supplies on hand and machine shop accounts was $73,735.41, charged off to profit and loss in 1871, and back again to machine shop account November 30, 1872.

Q. What was done in 1872?

A. November 30, 1872, the balance was $82,426.31, charged to profit and loss as material on hand November 30, 1872, as per report of C. T. Peddle, superintendent, and this amount is not charged back to machine shop account as before, but a pencil memorandum of the amount is carried along at the top of the debit column of machine shop account for several years thereafter.

736 Q. Now, I wish you would turn to the entries on the journal, and point out the manner in which those pencil memoranda were kept.

A. It was on the ledger.

Q. It is Journal E, page 254 here. That will give you the ledger page.

A. Shall I read the entry?

Q. Give the ink entries and the pencil entries on the ledger, giving the page of the ledger.

A. Ledger E, page 212, machine shop account. The first ink entry is 1872, December 31. To accounts payable. 275 (that is the page) $47,749.63. Interlined above that is the following entry in pencil: To surplus ac., 1872, Journal E, folio 254, $82,426.31.

Q. How were the entries after that time, during the succeeding years, and how long did they continue? I will withdraw that question. It is not material to show what happened after January 17th, 1873.

A. 1873 is the next one. The first ink entry is December 31, 1872, but the transfer of that balance there is November 30, the journal transfer of that balance is November 30th.

Q. Now, were you able to get the machine shop books?

A. I never did get them. I asked for them.

Q. The machine shop books were not among the books that were furnished you?

A. No sir.

Q. By the way, have you brought over the list so that you can give the detailed schedule of all the books that were furnished to you?

A. Yes sir.

737 Q. I wish then you would at this point give a detailed list of all the books that were furnished you by the receiver for the purpose of this investigation.

A. Stock Transfer Register No. 4; Record A, executive and finance committee; Records, Three.

Q. That is three volumes of the record?

A. No sir, Record No. 3. These three books were returned to W. G. Phelps, assistant secretary, and receipt taken July 16, 1898, at the request of the receiver. Besides these we were furnished with General Ledgers A. B. C. and D. General Journals A. B. C. D. E. and G; Annual Reports, 1853 to 1868 inclusive; Annual Reports 1869 to 1877. inclusive; Ledger No. 1; Journal No. 1; Stock Ledgers A. and B; Stock Journal B; Index No. 2 to Ledger b; Transfer of Stock; Transfer Book No. 2; Record 2; Treasurer's Cash Book, 1864 to 1875.

Q. Turning now to Exhibit No. 21, cross tie account, page 4 of the exhibit, I will get you to state to the master whether a similar course of entries appeared upon the books with reference to the cross tie account as that which you have given in detail with respect to the machine shop account; and if not what was the——

A. There were similar entries from the close of 1869, that is, November 30, each year.

Q. By the way, going back to the machine shop account, when was the first instance where these transfers of account that you have mentioned begun?

A. November 30, 1867.

Q. Before that time the transfers didn't appear in the form in which you have described them upon the books?

A. Before that time the balance was reported as assets.

738 Q. Now, going to page 5 of Exhibit 21, what was the fact with reference to the account designated "Wood purchased account."

A. That is the cross tie account. At the close of 1871 the balance was $1200.

By Mr. WILLIAMS:

Q. What is that?

A. It is the cross tie account. It takes a different course from

the other account. The balance of $1200 was charged to profit and loss November 30, 1871, Journal E, page 97, and this entry closes the cross tie account. This amount is charged back to railroad and bridge material, Journal E, page 250, under date of January 21, 1873, posted on ledger November 30, 1872, Ledger C, page 166.

By Mr. KETCHAM:

Q. What was done with the railroad and bridge material account after that?

A. At the close of 1872 there was a balance of $8,833.97 to the debit of railroad and bridge material, which was charged to profit and loss, Journal E, page 254, under date of February 10, 1873, but posted on Ledger C, page 166, as of November 30, 1872. This balance is not charged back to railroad and bridge material, and credited to profit and loss, but is carried along year after year in pencil on the debit side of railroad and bridge material account.

Q. What was the effect of that entry?

739 A. To permanently reduce the apparent amount of assets and the apparent amount of surplus, the apparent amount of assets on hand.

Q. Did you say when that began with the cross tie account?

A. In 1869.

Q. Prior to that time how were the entries with reference to that on the books?

A. I was mistaken; that begun in 1868 on the cross tie account.

Q. Prior to that time how had the account been carried on the books?

A. Prior to that time the balance was carried forward on the books and reported in the printed statements as assets.

Q. Now, I wish you would go to the wood purchased account, and if there was any change in the system of keeping the books with respect to this account, you may state when that change begun and what the change was, and how long it continued.

A. The same system was continued through the wood purchased account prior to and including 1866: the balance was carried forward on the ledger and reported in the printed statement; at the close of 1867 the balance was charged off to profit and loss and charged back again at the close of 1868. When I say at the close of the year I mean at the close of their fiscal year, November 30. That continued until the close of 1872. At that date the balance is $5,583.92, charged to profit and loss, Journal E, page 254, not charged back again but carried along in pencil memorandum on the ledger.

740 Q. Now, go to the railroad and iron account; if there was any change in the method of keeping this account upon the books, state when that change began and how it began, and how it continued thenceforth.

A. At the close of the year, 1863 Ledger B, page 289, railroad iron account shows a balance on the debit side of $9,000, carried to a new account, 1864, and reported in the printed statement as assets.

Adding debits and deducting credits during that year the balance, November 30, 1864, the debit balance was $89,748.80. There is an entry in Journal C, page 247, showing an inventory of the material on hand, in that account, and amounting to $21,920, and this amount is credited to the account of 1864, and debited to the new account 1865, ledger page 333, leaving a balance on the 1864 account of $67,828.80. In former years the balances after inventory taken were charged off to repairs of road. This year it was not done. The account of 1865 stood $21,920 for material on hand. The account of 1864 stood $67,828.80 balance of 1864. On page 252 of the journal appears an entry charging back to the account of 1864 and crediting the account of 1865 with the same $21,920, cancelling the account of 1865 and putting back the account of 1864 where it was, $89,748.80. That balance, the entire balance is afterwards charged off to repairs or road including $21,920 on hand, and the account of 1865 re-opens with the new purchases.

Q. Now, what became of the balance on hand?

A. I don't know. It is charged off to repairs of road.

741 What became of the actual goods, I don't know. I suppose they remained in the machine shop.

Q. The $21,920 which appeared to be there as the result of an inventory, as I understand by these entries is charged off to repairs of road?

A. Ultimately, yes sir.

Q. At the close of 1866 and 1867, the respective balances on this account were charged to repairs of road. At the close of 1868 the balances of the account is $64,824.71, Ledger C, page 269. This balance is carried to page 321, and charged to profit and loss, Journal E, page 237, charged back to railroad iron account November 30, 1869, Journal D, page 362; the same class of entries in 1869, 1870, and 1871. In 1872 the balance was charged to profit and loss.

Q. Under what date?

A. Under date of February 10, 1873, Journal E, page 254, posted as of November 30, 1872, Ledger C, page 166. This balance was not charged back to railroad iron account, but carried along in pencil at the top of the debit column.

Q. On what book?

A. It is on the ledger.

Q. Now, I wish, you would get me statement No. 12. And I will ask you to state to the master if you have prepared a statement of the receipts from the operation of the road, from transportation account, from the beginning when it opens until 1854; and if so, will you produce the statement?

A. I have it itemized, the transportation account, from the beginning to 1854, with Exhibits A to E inclusive.

742 Q. What were the receipts—when did they begin, when did they open up with receipts from transportation?

A. November, 1851.

Q. Now, what were the receipts from that time until June, 1852?

A. The receipts, including June, to the 30th of June, $36,785.44.

Q. What were they from July to December?

A. I cannot tell that without figuring it. I have carried it right along down. I can give you from June to December or the entire amount.

Q. How have you got it distributed?

A. I have got it carried right along, first a lot of debits down to July 1st, 1850, and then credits, 1852, that goes down to July, 1852, and then I have got credits down to that date, showing the balance, and then I go on with the receipts the next year and take off the credits.

Q. During the first period, that is to June, 1852, what were the charges on account of transportation account?

A. Two charges to profit and loss account.

Q. What was the net amount?

A. $1,926.34.

Q. That is of the two charges?

A. There are debits to the transportation account and credits to the profits and loss.

Q. Will you please produce, if you have it, a typewritten copy of statement No. 12, and hand it to the reporter to be identified as Exhibit No. 22?

A. I have done so.

743–778 Mr. KETCHAM: I will offer this statement in evidence.

The statement, being Mr. Duy's statement No. 12, was admitted in evidence and marked by the reporter "Exhibit No. 22, October 4, '99, W. S. G.," the same being in the words and figures following, to-wit:

(See next page.)

779 Q. Now what were the receipts, gross and net, from transportation at the end of December, 1852, giving each amount?

A. The whole receipts up to that time.

Q. Yes sir.

A. $105,943.87 credits, and the debits were $60,083.82.

Q. And what was the net?

A. The net balance $45,860.05.

Q. Now, what were they at the end of the next period, December, 1853?

A. The receipts for that period including the balance of——

Q. $45,860.05.

A. Was $249,132.26.

Q. And what was the charges during that period?

A. The charges balance the account.

Q. Now, is there any net amount at the end of that period as the result of the transportation account, and if so, what became of it?

A. On this transportation account the credits are for the year 1853 here, $203,272.21. March 19, 1853, there was a transfer from surplus account, $25,296.24, included in the above. This leaves the

actual receipts for 1853, $177,975.97. There was a deduction for operating expenses, $66,331.37, leaving net earnings from transportation, $111,644.60, which agrees with the printed report.

Q. Now, what became of the item $111,644.60?

A. Credited to the surplus account.

Q. Now, out of that, and before transferring anything to the surplus account, was there any dividend declared?

780 A. Yes sir.

Q. When?

A. January 18, it is charged, 1853.

Q. What was the amount of the dividends?

A. $25,296.24.

Q. In what manner does that dividend enter into the account of that year?

A. It is charged out of transportation earnings.

Q. Now what was there in 1854 by way of receipts from transportation and charges to transportation?

A. Transportation receipts were $239,992.96.

Q. And the charges against that were what?

A. Dividend, July 11, $44,655.

Q. At what rate per cent. was that dividend, and upon what amount of stock?

A. Five per cent. on $893,100.

Q. For what period?

A. The six months ending July 1st.

Q. Were there any other dividends during that year?

A. Dividend charged December 31st, five per cent. on $924,100, $46,205.

Q. What were the total debits during that year?

A. The total debits, including $23,677,55, transferred to surplus account, amounting to $239,992.96.

Q. Now, Mr. Duy, I will ask you to produce your statement No. 13, and hand it to the reporter, to be marked as Exhibit "No. 23."

Mr. Duy's statement, No. 13, was marked by the reporter, "Exhibit No. 23, October 4, 1899, W. S. G."

781–795 Q. Now, I will ask you if you have prepared a statement showing the receipts from transportation, and the expenses on account thereof, from January, 1855, to December, 1855.

A. I have.

Q. I will ask you if you have a typewritten copy of it, to produce it and hand it to the reporter, that he may identify it as Exhibit No. 23.

A. That has been done.

Mr. KETCHAM: Now, I will offer this statement No. 13, Exhibit "No. 23," in evidence.

The said statement, No. 13, Exhibit "No. 23," was admitted in

evidence; and the same will be found in the words and figures following, to-wit:

(See next page.)

796 Q. Now, I will ask you to state what were the total receipts from transportation during the year 1855?

A. $287,711.94, including an item of $199.40, for rent, which is credited to transportation account on the books.

Q. How, with reference to the secretary's statement, whether it was included in the secretary's statement, or omitted?

A. It was not.

Q. It was either omitted or included?

A. It was not included.

Q. Now, what were the total debits during that period?

A. The total debits would balance the credits.

Q. Now, included in those debits were what amount, if any, on account of dividends, and if there were any, for what period, at what rate per cent., and upon what amount of capital stock?

A. Dividend of July 19th, five per cent., for six months ending July 1st, on $948,800, capital, $47,440. Dividend December 31st, five per cent., for the six months, on $974,800, $48,740.

Q. There was nothing carried to surplus fund, or profit and loss account in that year?

A. Yes sir, carried to surplus $52,147.32.

Q. In connection with that exhibit there are itemized statements showing the "interest account," "running road account," "repairs account," and "machine shop account," in detail?

A. Yes sir.

Q. I will ask you if you have prepared an itemized statement with details of the expense account, of the receipts from transpor-

797 tation for the eleven months from January 1st to November 30, 1856, and if you have prepared one, and have a typewritten copy thereof, will you hand the typewritten copy to the reporter, to be identified as "Exhibit No. 24."

A. I have prepared it, and present it.

The statement, being Mr. Duy's statement No. 14, was marked by the reporter, "Exhibit No. 24, Octtober, 4, '99, W. S. G."

Q. Will you tell us what were the total gross receipts from transportation during those eleven months?

A. $531,875 07.

Q. Included in the counter-charges you may state what if any dividend was paid during the period, and if one was paid give the rate per cent. and the amount of capital stock upon which it was computed, with the total amount of dividend paid.

A. June 20, five per cent. on $990,850, $49,542.50. November, charged the 30th, dividend, seven per cent. on $1,082,850, $75,799.50.

Q. What amount if any during this period was charged to profit and loss, or credited to profit and loss?

A. Credited to profit and loss, $217,051.81.

Q. This last is described as dividend No. 9. Have you given us the others?

A. I have not given you dividends heretofore.

Q. I will call your attention on Exhibit No. 22, to the item under date of March 19, 1853. Do you find there any account of a dividend?

A. Yes sir.

Q. How much?

798 A. $25,296.24.

Q. For what period?

A. That is a sum transferred to transportation account from the surplus account, the dividend being charged to surplus account, and it is what I deducted from the gross earnings on my statement before.

Q. Is that the same that you have heretofore given as the dividend of January 18th?

A. That is dividend No. 1.

Q. January 18th, 1853?

A. Yes sir. Sometimes dividends were charged directly to surplus or profit and loss and did not go to the transportation account.

Q. I will get you to state to what number and amount of dividends were declared and paid up to the dividend which is described on Exhibit No. 24 as dividend No. 9, a seven per cent. dividend, $75,799.50.

A. Including that?

Q. Up to that time, and the evidence already shows about that.

A. Down to the seven per cent. dividend of 1856.

Q. The one that is described on Exhibit No. 24 as dividend No. 9?

A. Nine dividends were paid, amounting to $392,932.73. Of these, No. 2, August 1st, 1853, $25,710.49, three and a half per cent. on $734,585.60 was paid out of surplus account; No. 3, January 19th, 1854, four per cent. on $738,650, $29,546 was paid out of surplus account.

Q. That is to say then that of these first nine dividends six were at the rate of five per cent., one at the rate of seven per

799–825 cent., one at the rate of three and a half and the other at the rate of four.

A. That is a right; nine dividends, one three and a half, one at four, one at seven, and six at five.

Q. They were semi-annual dividends, were they?

A. There were two at four per cent.

Q. What other one was at four?

A. No. 1 and No. 3. January 18th, 1853 was a four per cent. dividend; and five at five per cent.

Mr. KETCHAM: I offer this Exhibit No. 24 in evidence. It is Mr. Duy's statement No. 14.

The statement, being Mr. Duy's statement No. 14, was admitted in evidence and marked by the reporter "Exhibit No. 24, October

4, '99, W. S. G.;" the same being in the words and figures following, to-wit:

(See next page.)

826 The WITNESS: Mr. Williams says that I have called the amount of the first dividend incorrectly. He says it should be $25,294.24.

Q. Well, what was the dividend, $25,296, or $25,294?

A. The amount charged to transportation account on the first dividend—and this is the paper I read from—is $25,296.24; and then there was a two dollar dividend charged to surplus account, which makes $25,298.24 and on the other side there is a credit to surplus account for amount of dividend to Jacob Roth, not paid, four dollars, which makes Mr. Williams' figures correct. I was giving the amount as I gave it as charged to the transportation account, and it must be that to account for transportation.

Mr. WINTER:

Q. Then the total amount of dividends actually paid out is $392,930.73?

A. Yes, sir.

By Mr. KETCHAM:

Q. On Exhibit No. 24, I have a notation here something about weights, $540. I do not recall what that is. Do you find an entry there of $540 on this Exhibit No. 24?

A. It is charged to the transportation account on the debit side, page 1.

Q. Amount over-paid on freight charge $11,602.64, should have been $11,062.64 — $540.

827 A. It don't amount to anything; it is only the correction of an error.

Q. It is the correction of an error?

A. Yes, sir; when it was collected it was credited to transportation and then it was charged back. It is made plain in another place.

Q. Have you prepared a statement showing the receipts for transportation from November 1856 to November, 1857, including the corresponding charges to transportation account with an itemized statement of the details. If so, will you produce it, and if you have a typewritten copy, hand it to the reporter to be identified as Exhibit No. 25.

A. I have prepared it and produce a copy.

The copy produced, being Mr. Duy's statement No. 15, was marked by the reporter "Exhibit No. 25, October 4, '99, W. S. G."

Q. What were the total receipts during that year for transportations?

A. $482,271.59.

Q. State whether any dividends were paid during this period, and if so, what.

A. Dividend paid June 18th, semi-annual, six per cent. on $1,361,450, dividend $81.687. Dividend paid November 30th, charged as November 30th, six per cent. on same capital, $81,687.

Q. State whether there was any amount transferred to surplus account at this time, and if so how much?

A. There was $19,499.05.

828–855 Mr. KETCHAM: I will offer this Exhibit No. 25 in evidence.

The statement marked "Exhibit No. 25," was admitted in evidence, and the same will be found in the words and figures following, to-wit:

(See next page.)

856 Q. I will ask you if you prepared an exhibit, and a typewritten copy thereof, showing the receipts from transportation and charges thereto from January 31st, 1858—from November 30*ht*, 1857, to November 30th, 1858, and if so, will you hand the typewritten copy to the reporter to be designated as Exhibit No. 26?

A. I have, and hand the copy to the reporter.

The copy produced, being Mr. Duy's statement No. 16, was marked by the reporter "Exhibit No. 26, October 4, 1899, W. S. G."

Q. What was the total receipts during that year from transportation?

A. $380,274.60.

Q. During this year were there any amounts paid out in dividends, and if so, how much and when?

A. There is charged in this account December 18th, apparently a transfer to stockholders' account, $68,822.50. By an entry, Journal B, page 202, under date of June 21st, stockholders' account is charged with a dividend declared June 15th, five per cent. on $1,376,450, which is $68,822.50, the same amount transferred to the credit of stockholders' account in December from transportation.

Q. Those entries taken together indicate——

A. They indicate a dividend paid in June.

Q. A five per cent. dividend?

A. December 23rd, this account is charged with a dividend, five per cent. on the same capital, the same amount as the last.

857–877 Q. Any amount there charged to surplus fund?

A. $23,499.51.

Q. If during this year they appeared to have charged anything out of operating expenses on account of attorneys' fees you may state, and if so how much?

A. There was charged out of this account for attorneys' fees $755.60.

Q. I will ask you if that is the first item of attorneys' fees appearing upon the books of the company?

A. I cannot answer that question.

Q. Has your attention been called to any charge on account of attorneys' fees prior to this time?

A. No sir.

Mr. KETCHAM: I will offer this statement No. 16, of Mr. Duy's which the reporter has marked "Exhibit No. 26," in evidence.

The statement Exhibit No. 26, was admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

878–899 Q. Now, if you have prepared a statement and a typewritten copy showing the receipts from transportation from November 30, 1858, to November 30, 1859, inclusive, with attached exhibits, will you produce the statement, and hand the typewritten copy to the reporter to be identified as Exhibit No. 27?

A. I have done both.

The copy produced, being Mr. Duy's statement No. 17, was marked by the reporter "Exhibit No. 27, October 4, 1899, W. S. G."

Q. What are the total receipts?

A. $357,297.85.

Q. Whether any dividends were paid during this period you may state, and charged to this account; and if there were, give the amount and the rate per cent.

A. June 30th, 1859, five per cent. on $1,376,450, making $68,822.50, charged out of this account to stockholders' account. November—it is entered under date of November—dividend declared December 21st, five per cent. on $1,381,450, $69,072.50

Q. Any amount transferred to surplus account?

A. $22,187.62.

Mr. KETCHAM: I offer this Mr. Duy's statement No. 17, Exhibit No. 27, in evidence.

The statement, No. 17, Exhibit No. 27, was admitted in evidence; the same being in the words and figures following, to-wit:

(See next page)

900–924 Q. Have you prepared a statement and typewritten copy thereof showing the receipts from transportation and charges against it for the year ending November 30th, 1860? If you have please produce it and hand the typewritten copy to the reporter to be identified as Exhibit No. 28.

A. I have prepared such statement and hand the copy to the reporter.

The statement, being Mr. Duy's statement No. 18, was marked by the reporter "Exhibit No. 28, October 4, 1899, W. S. G." the same being in the words and figures following:

(See next page)

925 Q. What were the total receipts from transportation that year?

A. $404,599.61.

Q. Were there any dividends paid that year?

A. Two.

Q. When and what were they?

A. June 15th, charged to stockholders' account, five per cent. on $1,381,450, $69,072.50. December 20th, and charged to stockholders' account, five per cent. on the same amount, the same sum; and on the 20th of December, transportation account is charged with the aggregate of those two dividends, $138,145.

Q. Any amount carried to surplus account, and if so how much?

A. $55,252.87.

Whereupon the hour of twelve o'clock and thirty minutes having arrived the further hearing was continued until 2 o'clock p. m.

926 TWO O'CLOCK P. M., *Oct.* 4, 1899.

The parties met pursuant to adjournment.

Present: The same as before recess.

The examination in chief of the witness GEORGE C. DUY, was resumed, as follows:

Questions by Mr. KETCHAM:

Q. Mr. Duy, if you have prepared an exhibit stating from the 30th of November, 1860, to the 30th of November, 1861, the itemized earnings from transportation, with the charges against it, and if you have prepared a typewritten copy of such statement, I wish you would hand the typewritten statement to the reporter and let him identify it as Exhibit No. 29.

A. I have prepared such statement and I hand the reporter a typewritten copy.

The statement, being Mr. Duy's statement No. 19, was marked by the reporter "Exhibit No. 29, October 4, 1899 W. S. G."

Q. What amount of earnings from transportation were there during that year?

A. $377,692.37.

Q. Whether there were any dividends that year you may state.

A. No dividends charged to transportation account.

Q. Whether there was any amount carried to surplus you may state.

A. $190,409.76.

927–950 Q. If in point of fact there were any dividends paid during that year you may state whether charged to operating account or not.

A. There was a dividend paid, charged June 19, 1861, Journal B, page 396.

Q. What was the amount of it, and what per cent. and on what capital?

A. It is five per cent. on $1,381,450; and the amount of the dividend is $69,072.50.

Q. Any other dividends?

A. Dividend charged December 21st, 1861, Journal B, page 439, five per cent., on the same amount, $69,072.50.

Mr. KETCHAM: I offer this statement, Mr. Duy's No. 19, Exhibit No. 29, in evidence.

The statement, being Mr Duy's statement No. 19, marked "Exhibit No. 29," was admitted in evidence; the same being in the words and figures following, to-wit:

(See next page)

951 Q. If you have prepared a schedule showing the items of transportation account, for the year ending November 30th, 1862, with a typewritten copy therefor, will you kindly produce it and hand to the reporter the copy for identification as Exhibit No. 30?

A. I have prepared such a statement and hand the copy to the reporter.

The statement, being Mr. Duy's statement No. 20, was marked by the reporter "Exhibit No. 30, October 4, 1899, W. S. G."

Q. What was the total receipts from transportation during that year?

A. $563,314.15.

Q. Whether during that year there were any dividends charged to transportation account you may state.

A. There were not.

Q. How much if any was charged to surplus account?

A. $361,272.66.

Q. Whether in point of fact any dividends were declared and paid that year you may state; and if so what amounts, what per cent. and on what amount of stock.

A. There were. June 27th, Journal B, page 484, five per cent. on $1,381,450—no, $1,384,450. dividend $69,222.50. And on December 23, 1862, Journal B, page 537, a seven per cent. dividend on $1,440,450, $100,831.50.

952–972 Q. To what account were these dividends credited or charged?

A. They are charged to stockholders' account.

Q. What is the entry?

A. I have just given you the entries charged to stockholders' account. Stockholders' account is credited on the last date, and surplus account is charged $173,169.69, and that charge covers the two last named dividends and $3,115.69. United States taxes.

Q. So that the money with which the United States taxes and dividends were paid came directly from surplus account, and the

earnings went directly from transportation account into surplus account?

A. Yes sir.

Mr. KETCHAM: I will offer Mr. Duy's statement No. 20, marked Exhibit No. 30, in evidence.

Mr. Duy's statement No. 20, marked Exhibit No. 30, was admitted in evidence, and same is in the words and figures following, to-wit:

(See next page.)

973 Q. Now, if you have prepared a schedule showing the itemized transportation account for the year ending November 30th, 1863, with a typewritten copy thereof, will you kindly produce it, and hand it to the reporter for identification, as Exhibit, No. 31?

A. I have done so.

The statement, being Mr. Duy's statement No. 21, was marked by the reporter "Exhibit No. 31, October 4, W. S. G."

Q. What were the total receipts from transportation for that year?

A. $774,618.48.

Q. What amount of that was paid out in dividends directly from transportation account?

A. None.

Q. What amount of surplus account was transferred?

A. $412,436.26.

Q. If there in fact were any dividends paid out that year state the amount, the per cent., the per cent. upon the stock and the total stock, and the account from which the dividends were so paid?

A. June 23, 1863, Journal C, page 70, six per cent. on $1,491,450, and in addition to that, three per cent. Government tax, $2,767.63, making a total of $92,254.63.

Q. Three per cent. tax on what—tax on the dividend?

A. On the dividend, on the whole dividend. December 22nd, Journal C, page 111, seven per cent. on $1,517,450, and

974–1003 Government tax $3,285.19, making a total of $109,506.69.

Q. So that year, in addition to the thirteen per cent. in dividends there was paid the income tax on such dividends, which was paid by the road itself?

Mr. KETCHAM: I will now offer Mr. Duy's statement No. 21, marked Exhibit No. 31, in evidence.

Mr. Duy's statement No. 21, marked Exhibit No. 31, was admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

The WITNESS: The whole amount of those two dividends and tax is charged to stockholders' account and thence to surplus account.

1004 Q. Now if you have prepared a schedule showing the itemized transportation account for the year ending November 30th, 1864, with a typewritten copy thereof, will you kindly produce it, and hand the copy to the reporter to be identified as Exhibit No. 32?

A. I have prepared such statement and hand the reporter the typewritten copy.

The statement, being Mr. Duy's statement No. 22, was marked by the reporter "Exhibit No. 32, October 4, 1899. W. S. G."

Q. What were the total amount of earnings for that year?

A. $1,007,979.21.

Q. There were no dividends charged to transportation account?

A. No sir, none.

Q. What amount went from transportation account into surplus account that year?

A. $540,626.67.

Q. Were there, in point of fact, any dividends paid; if so how much, what per cent. on what amount of stock, and to what account was it charged?

A. June 20, 1864, Journal C, page 173, stockholders' account is charged with dividend, six per cent., on $1,899,150. The amount of that dividend is $113,949. In addition to that there was paid Government tax on the dividend $3,524.20, and Government tax on stock increase of April $11,771.51, making a total payment of $129,244.71.

1005 Q. This dividend that you have just given was the first dividend that was made upon the increased stock of $376,700, under the resolution of the board of directors of April 6, 1864, was it not?

A. Yes sir.

Q. And it is true, is it not, that up to this time there was never paid any dividend upon the $211,600, of increased stock, made under the resolution of the board of directors of November 30th, 1856?

A. I can not answer that now.

Q. I wish you would look that up, and I will come back to that. I will withdraw that question and ask it after I get through, and get that in connection with the stock. Now there was another dividend during this year, was there not?

A. Yes sir.

Q. Give us the particulars as to that.

A. December 24, 1864, Journal C, page 254; there was a dividend of five per cent. on $1,900,150.

Q. Any war taxes?

A. It amounted to $190,015.

Q. That will not do. The stock is less than $2,000,000, and five per cent. on two million dollars would be only a hundred thousand dollars.

Mr. WINTER: That is on the $2,900,150?

The WITNESS: The dividend is divided on the book here between eastern and western stockholders. In addition to that the Government tax was paid, ten thousand and seventy-eight dollars; total paid $200,015.78.

1006–1030 Q. It would take $3,800,000 of stock to produce $190,000, at five per cent.

A. It is not $2,000,000. It is 1,000,000, as I said at first. Oh, that is my mistake. It is five per cent. regular and five per cent. extra. It is ten per cent. on $1,900,150.

Q. Stock or cash?

A. Cash. That was an oversight of mine in reading.

Q. Now this was charged to what account?

A. That is charged to stockholders' account.

Q. And through it to surplus?

A. Yes sir, $540,626.67.

Q. That is the amount charged to surplus account from transportation this year, is it? $540,626.67.

A. Yes sir.

Mr. KETCHAM: I will introduce Mr. Duy's statement No. 22, marked Exhibit No. 32, in evidence.

Mr. Duy's statement, No. 22, marked Exhibit No. 32, was admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

1031 Q. Now, if you have prepared a schedule showing the itemized transportation account, for the year ending November 30th, 1865, which seems to be the high water mark in the company's affairs, with a typewritten copy thereof, will you kindly produce it and hand the copy to the reporter to be identified as Exhibit No. 33?

A. I have prepared such statement and hand it the typewritten copy, to the reporter.

The typewritten copy of Mr. Duy's statement No. 23, was marked by the reporter "Exhibit No. 33, October 4, 1899, W. S. G."

Q. What were the total gross receipts from transportation during that year?

A. $1,248,725.88.

Q. There were no dividends charged directly to transportation account that year, were there?

A. No.

Q. What was the amount of the surplus account?

A. Amount credited to surplus account, $593,670.79.

Q. If there were any dividends paid during that year please state when, what amounts, what per cent. on stock outstanding, and to what fund it was charged directly and into what general fund it ultimately came.

A. June 23rd, 1865, Journal C, page 365, dividend of six per cent. on $1,920,150 capital, making $115,209, and a Government tax of $6,063.63, making a total of $121,272.63. And on De-
1032–1057 cember 21st, there is a charged dividend on $1,928,150, making $115,689, and Government tax of $6,088.89 making a total of $121,777.89.

Q. How much was carried to surplus that year?

A. $593,670.79.

Mr. KETCHAM: I will offer Mr. Duy's statement No. 23 marked Exhibit No. 33, in evidence.

Mr. Duy's statement No. 23, marked Exhibit No. 33, was admitted in evidence; same being in the words and figures following, to-wit:

(See next page.)

1058 Q. Now, if you have prepared a schedule showing the itemized transportation account for the year ending November 30th, 1866, with a typewritten copy thereof will you kindly produce it, and hand it to the reporter for identification, as Exhibit No. 34?

A. I have prepared such a statement and hand the reporter the typewritten copy.

The typewritten copy of Mr. Duy's statement No. 24, was marked by the reporter "Exhibit No. 34, October 4, 1899, W. S. G."

Q. Will you state what was the total receipts from transportation during that year?

A. $1,049,720.28.

Q. What amount was credited to surplus fund from transportation that year?

A. $410,620.86.

Q. If there were any dividends that year, give the details and the fund to which they were entered.

A. July 26th, 1866, Journal "C" page 530, there is a dividend charged to stockholders' account as of June 22nd that dividend is six per cent. on $1,933,150, and amounts to $115,989; government tax $6,104.68 whole dividend $122,093.68. November 30th, 1866, Journal C, page 599, dividend charged to stockholders' account six per cent. on $1,983,150, $118,989; Government tax $6,262.55; total payment, $125,251.55. Those dividends are charged to stockholders' account and afterwards to surplus account, on page 600.

Q. These two items of something over $6,000 each that you have named as paid to the Government on account of Gov-
1059–1085 ernment tax in connection with the dividends are in addition to and exclusive of the internal revenue tax of $22,983.76, which appears on page 3 of the exhibit, are they not?

A. Yes sir.

Q. They represent simply the tax on the dividends?

A. Yes sir, the tax on the dividends and on the tax. It is a tax on the whole amount paid in.

Mr. KETCHAM: I will introduce Mr. Duy's statement No. 24, marked Exhibit No. 34, in evidence.

Mr. Duy's statement marked No. 24 marked Exhibit No. 34, was admitted in evidence; the same being in the words and figures following, to-wit:

(See next page.)

1086 Q. If you have prepared a schedule showing the itemized transportation account for the year ending November 30, 1867, with a typewritten copy thereof, will you kindly produce it, and hand the copy to the reporter for identification, as Exhibit No. 35?

A. I have prepared such a statement, and hand the reporter the typewritten copy.

The typewritten copy of Mr. Duy's statement No. 25 was marked by the reporter "Exhibit No. 35, October 4, 1899, W. S. G."

Q. Now, will you kindly tell us Mr. Duy, what was the total transportation for the year ending November 30, 1867?

A. $1,075,513.55.

Q. What amount was carried to surplus fund?

A. $485,550.75.

Q. No dividends charged to this account that year, were there?

A. No sir.

Q. Were dividends paid, if so, what per cent. on what, and to what account were they charged?

A. Dividend, July 6th, 1867, Journal D, page 55, six per cent. on $1,983,150, is $118,989; Government tax $6,262.55; total payment $125,251.55. December 28, 1867, Journal D, page 109, eight per cent. on $1,983,150, making $158,652; Government tax $8,350.15 total payment $167,002.15. Those dividends are charged to stockholders' account and afterwards to surplus account; afterwards transferred to surplus account, page 113.

1087–1097 Mr. KETCHAM: I will offer Mr. Duy's statement No. 25, marked Exhibit No. 35, in evidence.

Mr. Duy's statement No. 25, marked Exhibit No. 35, was admitted in evidence, same being in the words and figures following, to-wit:

(See next page.)

1098 Q. Now Mr. Duy if you have prepared a schedule showing the itemized transportation account for the year ending November 30th, 1868, with a typewritten copy thereof, will you kindly produce it, and hand the copy to the reporter for identification as Exhibit No. 36?

A. I have prepared such a schedule and hand the reporter the typewritten copy.

The typewritten copy of Mr. Duy's statement No. 26 was marked by the reporter Exhibit No. 36, October 4, 1899, W. S. G.

Q. What was the total receipts from transportation during that year?

A. $1,095,005.97.

Q. What was the amount of the surplus account, transferred to surplus account?

A. $493,010.30.

Q. And were there dividends paid that year charged to transportation account?

A. No sir.

Q. If there were any paid and charged otherwise, give the details.

A. Under date of July 1st, Journal B, page 169, charged to stockholders' account, a dividend of six per cent., which is as stated on the journal, upon $1,991,150. There is an error of $3,000 in that statement. It ought to be $1,988,150.

1099–1104 Q. It represents six per cent. on what sum?

A. The amount of the dividend is $119,289.

Q. That is six per cent. on $1,988,150? The calculation is right?

A. The Government tax on this dividend is $6,278.35, making a total payment of $125,567.35. December 23, as of December 19th, 1868, Journal D, page 229, stockholders' account, charged with a dividend of six per cent. on $1,988,150, $119,289; Government tax $6,278.35; total payment, $125,567.35. The amount of those last two dividends is charged to surplus account on page 239, of Journal D.

Mr. KETCHAM: I will offer in evidence, Mr. Duy's statement, No. 26, marked Exhibit No. 36.

Mr. Duys' statement No. 26, marked Exhibit No. 36, was admitted in evidence, the same being in the words and figures following to-wit:

(See next page.)

1105 Q. Mr. Duy if you have prepared a schedule showing the itemized transportation account for the year ending November 30th, 1869, with a typewritten copy thereof, will you kindly produce it, and hand the copy to the reporter for identification as Exhibit No. 37?

A. I have prepared such schedule, and hand the copy to the reporter.

The typewritten copy of Mr. Duy's statement No. 27, was marked by the reporter Exhibit No. 37, October 4, 1899, W. S. G.

Q. What was the total receipts from transportation that year?

A. $1,190,869.87.

Q. What amount was transferred to surplus?

A. $597,757.46.

Q. If there were any dividends that year, state the amount, the percentage on what amount of capital stock, and to what amount they were charged?

A. June 24, 1869, Journal D, page 299, stockholders' account is

charged with dividend of six per cent. on $1,988,150, making $119,289; Government tax, $6.278 35; total payment, $125,567.35. December 24, Journal D, page 369, stockholders' account is charged with a dividend of six per cent. on $1,988,150, $119,289;
1106–1111 Government tax, $6,278.35; total payment $125,567.35. On page 378 of the journal, the amount of these two last dividends is charged to surplus account and credited to stockholders' account.

Mr. KETCHAM: I will offer Mr. Duy's statement No. 27, marked Exhibit No. 37, in evidence.

Mr. Duy's statement No. 27, marked Exhibit No. 37, was admitted in evidence, and the same will be found in the words and figures following, to-wit:

(See next page.)

1112 Q. Now, Mr. Duy if you have prepared a schedule showing the itemized transportation account for the year ending November 30th, 1870, with a typewritten copy thereof, will you kindly produce it and hand the copy to the reporter for identification as Exhibit No. 38?

A. I have prepared such schedule and the reporter has the typewritten copy.

The typewritten copy of Mr. Duy's statement No. 28, was marked by the reporter Exhibit No. 38, October 4, 1899, W. S. G.

Q. What was the total amount of receipts from transportation this year?

A. $1,087,526.49

Q. What amount was carried as surplus?

A. The amount carried to surplus account is $459,465.05

Q. Now were there any dividends that year? If so give the details and the account to which they were charged.

A. June 23, 1870, Journal D, page 451, stockholders' account is charged with the dividend of six per cent. on $1,988,150, making $119,289; Government tax $6,278.35, total payment $125,567.35. January 3, 1871, Journal D, page 536, stockholders' account is charged with dividend of six per cent. on $1,988,150 making $119,289, and the Government tax of $3,058.69 making a total of $122,347.69; and on page 553, the amount of the last two dividends is charged to surplus account and carried to stockhold-
1113–1119 ers' account.

Mr. KETCHAM: I will offer in evidence Mr. Duy's statement No. 28, marked Exhibit No. 38.

Mr. Duy's statement No. 28, marked Exhibit No. 38, was admitted in evidence and the same will be found in the words and figures following, to-wit:

(See next page.)

1120 Q. Now Mr. Duy if you have prepared a schedule showing the itemized transportation account for the year ending November 30, 1871, with a typewritten copy thereof, will you kindly produce it and hand the copy to the reporter for identification as Exhibit No. 39?

A. I have prepared such a schedule and I hand the reporter the typewritten copy.

Mr. Duy's statement No. 29, was marked by the reporter Exhibit No. 39, October 4, 1899, W. S. G.

Q. What was the total amount of receipts from transportation for this year?

A. $1,002,720.74.

Q. What amount if any was carried to surplus account?

A. $410,933.11.

Q. What if any amount of dividends were paid, and if any, upon what amount of stock and the per cent., and the Government tax thereon, with the statement of the account to which the payments were transferred?

A. July 10, 1871, Journal D, page 630, stockholders' account was charged with the dividend No. 38, six per cent. on $1,988,150, $119,289; Government tax $3,058.69. Journal E, page 79, stockholders' account is charged with dividend No. 39. six per cent. on $1,988,150, $119,289; Government tax $3,058.69; total payment, $122,347.69. And on Journal E, page 98, the amount of the two last dividends is charged to surplus account, and credited to stockholders' account.

1121–1127

Mr. KETCHAM: I will offer Mr. Duy's statement No. 29, marked Exhibit No. 39, in evidence.

Mr. Duy's statement No. 29, marked Exhibit No. 39, was admitted in evidence, the same being in the words and figures following to-wit:

(See next page.)

1128 Q. Now Mr. Duy, if you have prepared a schedule showing the itemized transportation account for the year ending November 30, 1872, with a typewritten copy thereof, will you kindly produce it, and hand the copy to the reporter for identification, as Exhibit No. 40?

A. I have prepared such a schedule, and I hand the reporter a typewritten copy of it.

The typewritten copy of Mr. Duy's statement No. 30, was marked by the reporter Exhibit No. 40, October 4, 1899, W. S. G.

Q. What was the total amount that year as to the receipts from the transportation account?

A. $1,074,795.18.

Q. What amount was transferred to surplus, if any?

A. Nothing.

Q. What transferred to profit and loss?

A. $343,267.81.

Q. At this rate, did the company carry a surplus fund and a profit and loss account, both?

A. Yes sir.

Q. Were there any dividends paid that year, and if so how much, and to what account were they charged?

A. July 10, 1872, Journal E, page 171, a six per cent. dividend on $1,988,150, $119.289; Government tax. $499.11; total payment, 119,788.11, under date of January 20th, 1873, stockholders are charged with a dividend of six per cent. on $1,988,150, amounting to $119,289. No tax. The amount of the two last divi-
1129–1134 dends charged to profit and loss and credited to stockholders' account on page 253 of the journal.

Mr. KETCHAM: I will offer Mr. Duy's statement No. 30, marked Exhibit No. 40, in evidence.

Mr. Duy's statement No. 30, marked Exhibit No. 40, was admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

1135 Q. Now, I will ask you if you have made an exhibit covering either in gross or net, the earnings from the first of December, 1872, to the 15th of January, 1873, inclusive, and if so, state the manner in which you arrived at that; and if you have prepared a typewritten copy of the statement, please hand it to the reporter for identification, as Exhibit No. 41.

A. I have; it is my statement No. 34, and I hand the reporter the typewritten copy.

Mr. Duy's statement No. 34, was marked by the reporter Exhibit No. 41, October 4, 1899.

The WITNESS: For convenience of calculation we made the statement running down to January 15th, 1873, being a month and a half, or one-eighth of a year.

Q. In what manner was that statement made up?

A. It not being practical to arrive at the actual earnings from transportation account for that period, we made that statement by taking from Ledger D, page 52, the entire transportation receipts for the year 1873, which are $1,107,258.46, and deducting therefrom operating expenses, Journal D, page 418, for the year $825,075.49, leaving upon that estimate net earnings for the year $282,187.97, one-eighth of which, or estimated earnings for six weeks is $35,272,87.

We also added to that the net earnings of car service ac-
1136 count, Journal E, page 418, $5,726.40, for the year, one eighth of which is $715.80, which added to the net transportation earnings above gives $35,988.67.

Q. What other items of net earnings did you take into consideration in the preparation of this Exhibit No. 41?

A. We took into consideration the earnings from rent account.

Q. Amounting to what?

A. Amounting to $2,119.98, one eighth of which is $265.

Q. Any other items?

A. And the net earnings from interest and exchange account which is $3,235.87, one eighth of which is $404.48.

Q. Making a total of——

A. To that point of $36,658.15, estimated.

Q. That is estimated on the basis, taking one eighth of the year.

A. Yes, sir.

Q. You may state what the fact is as to how the accounts were kept, as to being concluded at the end of each month, so that you could reach it by giving each month's business separate from the other?

A. Well that would be a very troublesome task, because the various accounts were entered into transportation account as exhibits, are charged in, and credited in at the end of the year, and to get at the actual business, you would have to go into the detail of each one of these accounts.

Q. The item of operating expenses during that year, $825,075.49, I will ask you if any dividends entered into that amount, and if so, to what extent?

A. There were no dividends.

1137–1142 Mr. KETCHAM: Now I will offer in evidence Mr. Duy's statement No. 34, marked Exhibit No. 41.

Mr. Duy's statement No. 34, marked Exhibit No. 41 was admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

* * * * * * * *

1143 Q. As I understand you, on these exhibits that have been offered in evidence as to the receipts from operating expenses, from transportation, there are set forth those items that appear upon the books of the company to have been charged to transportation account?

A. Yes sir.

Q. And up to a certain period, as you have heretofore explained, the item of dividends were charged to transportation account; subsequent to that they were charged to either surplus, or profit and loss account?

A. There was an interruption—my recollection is, the first dividend or two were charged to transportation; then there were two that were charged to surplus, and then they went back to transportation account; that is my recollection of it.

Q. Well, the exhibits that you have furnished, so far as the dividends were charged on the books to transportation account, include the dividends?

1144 A. Yes sir.

Q. But so far as they were charged to surplus, or profit and loss their exhibits that have been put in evidence do not include the dividends?

A. That is right.

Q. In other words, these exhibits that you have introduced contain the items of the transportation account as they appear upon the books, without any endeavor on your part to distinguish whether they belong to transportation account, or do not; you have not assumed——

A. Not at all; I have given them as they are.

Q. Simply making a transcript from the face of the books, as the books were turned over to you?

A. They are substantial copies.

Q. I wish you would turn to Exhibit "No. 22," and state to the master what amounts appear to have been entered as operating expenses, from August to December 31st, 1852, and charged into transportation account?

A. There is nothing charged here as operating expenses, so called. There are various items charged here.

Q. Well, what is charged, then during that period, against the transportation account, the total? What amount is charged to transportation account during that period?

A. Under date of December, 1852—probably the 31st; there is no date given—there are charged to transportation account, various items, "running road account"—do you want the amounts of each?

Q. No, I want the aggregate of the items, the two different items that were charged there, the two different aggregates that are entered there.

A. One is $34,497.82 and the other is $25,586.

Q. The $25,586, is on account of what?

1145 A. Of interest paid.

Q. And the $34,497.82, is on account of what?

A. "Running road account," "Repairs of machinery," "Wood and oil account," "Loss and damage," Salaries," "Stock killed," "Incidental expenses," "Depot services," "Repairs of road."

Q. What, from January 1st, 1853, to December 31st, 1853, was charged to transportation account, on account of expenses?

A. $66,331.37.

Q. What, from January 1st, 1854 to December 31st, 1854, was charged to transportation account for expenses of operating the road?

A. I should have to assume to determine what are expenses of operating the road, the same class of items that I called before.

Q. Excluding from those dividends, interest, taxes and surplus fund?

A. $80,669.57.

Q. Going, now, to Exhibit "No. 23," from January 1st, 1855, to December 31st, 1855, what amount of expenses are charged to transportation, other than dividends, interest, and taxes and surplus account?

A. $98,009.18.

Q. Now, go to Exhibit "No. 24," and state what amount was charged to transportation account, from the first of January, 1856, to the 31st of December, 1856, other than dividends, profit and loss, taxes and interest?

A. $160,378.09.

Q. I notice on these different exhibits that have been introduced there are attached exhibits describing certain accounts, on Exhibit No. 22, "Running road account," "Repairs," "Salaries ac-
1146 count," and "Road interest account," and so forth. From what sources did you obtain this distribution? Is that your own distribution, or is it a distribution appearing upon any of the books, or reports of the company furnished to you?

A. I got those accounts from the fact that the end of the year, those accounts which have been running through the year are charged to transportation account; when we make our charge to transportation account, at the end of the year, for the aggregate amount of each of those accounts, we make an exhibit of the items which go to make it up during the year.

Q. I asked you the question from Exhibit No. 22, just simply by way of illustration. What I want to get at is in the book of original entry, the journal, to what account are these various matters charged?

A. Charged to transportation account, in the original entry.

Q. In the original entry on the journal?

A. They are charged to those accounts which are transferred to the transportation account.

Q. During the year, then, if I understand you, there is kept on the ledger——

A. On the ledger?

Q. And on the journal?

A. Yes sir.

Q. These various subordinate accounts?

A. Yes.

Q. And at the end of the year they are consolidated and entered into the transportation account on the ledger?

A. At the end of the year the balance appearing to the debit of each of these accounts is transferred over to transportation
1147 account. Generally it is done in one item. Sometimes they do not get them all together in one item.

Q. But the distribution into these several accounts is a distribution that you have taken from the books?

A. From the books.

Mr. WILLIAMS: Mr. Ketcham, would you permit a question for information?

Mr. KETCHAM: Certainly.

By Mr. WILLIAMS:

Q. Mr. Duy, what are these little figures to the right of the writ-

ten matter in your exhibits, between the written matter and the right hand column of figures.

A. Oh, that is the number of the voucher, I presume. Sometimes there is a "V" before it; sometimes there is a number in the book.

By Mr. KETCHAM:

Q. If you can, take an entry and make an explanation, or illustration of it.

A. Say on Exhibit No. 24, Journal B, page 110. Now, upon Journal B, page 110, November 30, 1856, appears this entry: "General transportation account, to sundries." And then it itemizes them, "Running road," "Depot expenses," "Oil, waste and tallow," "Fuel," "Salaries," "Incidentals," "Repairs of road," "Repairs of bridges," "Repairs," "Water stations," "Stock killed," "Loss and damage," and "Water rent." The aggregate of that is $135,488.61. That is posted in one item to the general transportation account.

But in making out these statements I have copied the journal
1148 entry verbatim, giving all the items and those of greater magnitude we have made an exhibit showing the details that enter into it.

By Mr. HAWKINS:

Q. To illustrate that further, take Exhibit B in that same statement, and explain it.

A. This entry that I have read, general transportation is charged, and depot expenses are credited with $12,721.25. On my statement it is entered "Depot expenses, $12,721.25," and Exhibit B discloses that depot expense account for the year, showing that balance standing against it.

Q. And that depot expense account is taken from the books?

A. Taken from the books, item by item.

Q. Item by item as it appears in the book?

A. Yes.

Q. It is an account in the book, depot expense?

A. Yes sir, these statements are practically and substantially a copy of the entries on the books.

By Mr. KETCHAM:

Q. Turn now, to Exhibit No. 25, and I will get you to state what amount, exclusive of dividends, taxes, interest and surplus account, was charged against transportation account for the year 1857?

A. $275,192.92. Examining the secretary's printed report for that year I find that $275,192.92 is classified by him. In making this statement I classified it after the general statement. I made a classification like his. Of that $275,192.92, he classifies as operating expenses $210,084.34, and as additional expenditures for which
1149 he gives the items, $65,108.58, making a total of $275,192.92.

Q. Now will you state what those additional expenditures as

taken from the secretary's report, cover, what items they cover, giving the amounts set opposite the items?

A. Rebuilding bridges and culverts, $36,912.03; real estate for depot grounds, $100.; real estate for gravelling, $736.; passenger cars, $4,514.78; patent brakes, $1,560.; baggage, freight and coal cars, $9,850.04; stationary machinery, $2,538.84; extension depot at Indianapolis, $8,896.89; total additional expenditures, $65,108.58.

Q. Can you now indicate at what page in the secretary's report we will find that classification?

A. It is under date of December 21, 1857; probably it is not paged. Some of them are and some of them are not.

Q. I wish you would turn to the report of the president, November 30, 1857, page 4, and give us from that, the statement in that report, in regard to the operating expenses of the road.

A. (Reading:) "While the operating expenses of the road have not been unusually large the aggregate expenditures have been increased by the making of permanent improvements, the cost of which has been charged to the income of the road, as by the order of the board the construction account was closed last year."

Q. Now, go to Exhibit No. 26, your statement No. 16, and I will get you to state what, during that year, were the operating expenses of the road, as classified in the report of the secretary, of December 23rd, 1858, and what other expenditures there were during that year, and how those expenditures were classified by the secretary?

A. The expenditures classified by him as operating expenses, amount to $175,127.93, interest and exchange, $18,052.04,
1150 and additional expenditures, rebuilding bridges and culverts, $15,890.07, equipment car account $405., extension depot at Indianapolis, $715.95, new boiler shops, $931.19, legal expenses $755.60, total additional expenses $18,697.81; total of all given, $211,877.78; which covers all the expenditures that year, excepting taxes, dividends and amount transferred to surplus.

Whereupon, the hour of 4.30 having arrived, the further hearing was adjourned until tomorrow, Thursday, October 5, 1899, at 10 o'clock a. m.

THURSDAY, *October* 5, 1899—10 o'clock a. m.

The parties met pursuant to adjournment.

Present: The same as on yesterday.

The examination-in-chief, of the witness GEORGE C. DUY was resumed, as follows:

Questions by Mr. KETCHAM:

Q. Now, Mr. Duy, I wish you would turn to your statement 17, Exhibit No. 27, and give us the total debit side of the transportation account from November 30, 1858, to November 30, 1859?

A. $357,297.85.

Q. Now, I wish you would turn to the secretary's statement of

receipts and expenditures, in his printed report, for the year ending November 30, 1859, pages 12 to 14, and give us how, in what
1151 manner, those expenditures were distributed upon that report, by the secretary for that year?

A. That appears on page 15.

Q. First, give us what is stated there to be operating expenses?

A. $165,568.56.

Q. Now, how are the other expenses that aggregate with that, $357,297.85, classified by the secretary on his report?

A. Additional expenditures $9,574.43, net earnings $182,154.86.

Q. And those net earnings in turn are distributed how?

A. Not at all on that page.

Q. Well, on that report are they distributed?

A. On the next page, statement No. 2, general account, including the balance in the treasurer's hands, of November 30, 1858, transportation receipts and other receipts, the total aggregate receipts are reported as $453,605.24, and of that amount there are expended $353,589.61, for various items, leaving a balance that year of $100,015.63, that is stated to consist of bills receivable, $13,326.56, due for U. S. mail, $7,850.17, treasurer $78,830.90.

Q. Do you not find in that secretary's report any distribution of the amount of $182,000?

A. On page 13 that amount of net earnings, $182,154.86, is distributed as taxes, $7,645.67, interest and exchange $14,426.57, two dividends $137,895, total $159,967.24 leaving for surplus earnings, $22,187.62.

Q. Those four items aggregate $182,154 86?

A. Yes sir.

Q. Now, let us have statement No. 18, Exhibit No. 28. Turning to Exhibit No. 28 I will get you to state the aggregate debtor
1152 side of the account and the manner in which it is distributed by the secretary in his report of December, 1860?

A. The transportation earnings for that year are $404,599.61. They are distributed on the secretary's statement, operating expenses $171,826.62, additional expenditures, $15,391.44.

Q. How distributed—the items?

A. New cars built $5,459.08, new station buildings at Greencastle, $1,797.13, rebuilding bridges and culverts $7,433.38, legal expenses $32.53, overcharges $669.32, leaving net earnings $217,381.55.

Q. How distributed?

A. On page 13 of the same report there are taken from that balance the net earnings, $217,381.55, the following items: Taxes, $5,738.87; interest and exchange, $18,244.81 making $23,983.68, leaving a balance of $193,397.87, which is not classified.

Q. Can you tell from the books what items this amount of $193,397.87 is composed? Look at the account of the dividends for that year, and the amount transferred to surplus, on page 2 of that surplus?

A. There were two dividends paid that year, amounting to $138,145 and carried to surplus account, $55,252.87.

Q. And do they in connection with the items of interest and taxes $217,381.55?

A. Yes sir.

Q. Now, let us have Exhibit No. 29. What, during the year ending November 30, 1861, was the total amount charged to operating expenses account, and in what manner was that amount distributed upon the secretary's books?

A. The total amount was $377,692.37.

1153 Mr. WILLIAMS: That is the receipts?

Mr. KETCHAM: I understand that, and the charge to transportation account is the same amount.

Q. Now, Mr. Duy, I want to get the distribution of that.

A. On the secretary's statement, page 11, report of December 20, 1861, operating expenses $159,779.07, additional expenditures, the following items: Legal expenses $717.50; overcharges, $846.85, donation to State fair grounds, $165.; making $1,729.35, added to operating expenses, makes $161,508.42, net earnings $216,183.95.

Q. How was that distributed?

A. I do not find any specific distribution of that sum—wait a moment—on page 7 of the same report, there are deducted from the net earnings, taxes $5,452.66, interest and exchange $20,321.53, leaving $190,409.76.

Q. What became of that?

A. There was that amount credited to surplus account on the 30th of November.

Q. Referring to Exhibit 30, what distribution was made of the transportation earnings, aggregating $563,314.15 and what distribution was made of the items thereof, on the secretary's report of December 23rd, 1862?

A. The secretary's report, for the year ending November 30, 1862 page 16, there are charged against receipts, operating expenses, $200,514.38; additional expenditures, legal expenses, $1,028.81; donation to State fair grounds, $498.30, making $1,527.11; that, added to the operating expenses, making $20[illegible],041.49; leaving net earnings, $361,272.66.

Q. What became of that, as shown by the books?

1154 A. Carried to surplus account, November 30, 1862.

Q. Calling your attention to Exhibit No. 31, what disposition was made of the earnings for transportation for the year ending November 30, 1863, $774,618.48, and what distribution thereof was made by the secretary, as appears from his report?

A. The report for the year ending November 30, 1863, pages 9 and 10, operating expenses $319,170.; Government tax on passengers, $9,285.03; Government tax on machine shop, $889.02; total $329,344.05, leaving net earnings $445,274.43. Afterwards is charged additional expenditures, rebuilding bridges $39,229.73; new locomotives purchased, $37,343.50; new freight cars purchased, $42,705.02; new buildings and extensions, $3,271.54; donation to State fair grounds $234.30; legal expenses, $372.65; State and

county taxes, $5,805.32, interest and exchange, $8,785.22; aggregating $137,747.28, leaving a net balance of transportation account $307,527.15.

Q. Now, the question called for the distribution of the receipts from transportation for that year. I will ask you if in the detail which you have given, from the secretary's report, whether some portion of that, of those expenditures, did not come from surplus account, and not at all from the transportation account, during that year?

A. That is true, the books show so.

Q. Now, what proportion of the items that you have given, are charged to surplus account, and what part is charged to transportation account, for that year?

A. I can immediately give the items of additional expenditures, which are charged to transportation account: Rebuilding bridges, $39,229.73; new buildings and extensions $3,275.54; dona-
1155 tion to fair grounds, $234.30; legal expenses, $372.65. How much does that aggregate?

Q. $43,108.22.

A. The other items amounting to $94,639.06, are charged out of surplus and interest account, as will appear on our statement No. 65.

Q. Now, I will ask you to give the items of the transportation account for that year, that were distributed by the secretary, as operating expenses?

A. The whole, in detail?

Q. Yes sir, in detail, now, because there seems to be some little trouble about it.

A. There has been a good deal of trouble about this report. Train expenses, $51,333.73; there are four main items of the operating expenses. Running road, $80.041.14;

Q. That includes what items?

A. That includes train expenses, $51,333.73; oil, waste and tallow, $5,007.71; fuel, $23,667.70; water supplies, $32.00; total $80,041.14. Road repairs, repairs of road-bed and track, $39.194.35; repairs of water stations, $164.90; repairs and renewal of fences, $2,069.34; renewal of cross-ties, $6,244.87; renewal of railroad iron, $40,972.17; total, $88,645.63. Machine shops, consisting of repairs of engines, cars, etc., $55,027.68. Renewal and repairs of cars, $13,919.99; total, $68,947.67. Sundries: Repairs of building, $8,300.07; repairs of bridges, $5,550; loss and damage, general account, $4,843.23; loss and damage, Cartersburg bridge, $6,739.85. Station expenses——

Q. What do those two aggregate?

A. If you put the aggregate in there I think it will disturb his——

1156 Q. No, it won't.

A. The aggregate is $11,583.08.

Q. Station expenses now.

A. Station expenses, $31,926.21; telegraph expenses, $3,382.40;

mail expenses, $384.75; stock killed, $1,016; foreign agencies, $3,597.94; salaries of officers, $8,866.62; office furniture, $269.18.

Q. $269.18?

A. It is eighteen cents in the printed statement; the books show twelve; it is a misprint, I think. That eighteen cents should be twelve cents. Bridge watchman, $1,688.; incidental expenses, $5,020,87; total of sundries, as stated, $81,535.56, should be $81,535.62.

Q. What about $96. for the Government stamps? That is a deduction from the incidentals, $5,020.87. Explain that.

A. The secretary charged in that statement incidental expenses, $5,020.87. The actual charge is $4,924.87, showing a difference of $96. for United States stamps. That $96. is charged on the books to surplus account, and does not appear in the transportation account.

Q. Now, what was the aggregate of those operating expenses and sundries, that you have just given?

A. They are all operating expenses.

Q. I understand that.

A. $319,170., as stated here.

Q. As stated in the report?

A. As stated in the secretary's report.

Q. Now, of that amount I understand $96. really did not belong on the books in the transportation account? But did belong in the surplus account?

A. The actual amount charged to the transportation account, for those items, was $319,074.

1157 Q. That is got by eliminating the $96.?

A. Yes sir.

Q. For this year how much was transferred to surplus?

A. $412,436.26.

Q. And at that time how much was on account of these matters that you have mentioned in detail, charged to surplus?

A. The items mentioned as additional expenditure in the secretary's report, charged out of the surplus account on the books, to the amount of $94,639.06, and the $96. for stamps, was charged out of the surplus account.

Q. Making a total of $94,735.06?

A. Correct.

Q. Are those items numerous, or are they only a few?

A. Oh, there is quite a number of them. The items that you haven't checked there I cannot state, on this book. Yes, I can give them here.

Q. Well, if they are numerous——

A. There are five or six.

Q. If there are only five or six give them to me.

A. The $94,639.06, charged to surplus is composed of the following items: New locomotive purchased, $37,343.50; new freight cars purchased, $42,705.02; State and county taxes, $5,805.32; interest and exchange $8,785.22.

Q. Now, I wish you would take Exhibit No. 32, and state what

amount of transportation receipts, $1,007,979.21, what amount of expenditures were charged against the transportation receipts, $1,907,979.21, and in what manner these expenditures were distributed on the secretary's report, for that year?

A. On the books the whole amount is charged against the account.

Q. What distribution was made on the secretary's report?

1158 A. On the secretary's report, for the year ending November 30, 1864, page 10, statement No. 1, it is distributed as operating expenses, $467,352.54. There are charged Government tax on receipts, $18,704.11; Government tax on machine shop, $668.16, making a total of $486,724.81.

Q. What amount was charged to surplus?

A. $540,626.67.

Q. That was credited to surplus, was it not?

A. Credited to surplus, yes sir.

Q. Now, this last item that you speak of, aggregating $19,372.27, were they charged to transportation account?

A. Yes sir.

Q. Were they charged to surplus?

A. Those items for Government tax are charged out of the surplus account. They are not charged out of transportation.

Q. What disposition upon the secretary's report was made of the item of $265. station expenses? Was that included in the item of the "sundries"? Have you a detail of those items, "running road," "road repairs," "machine shop" and "sundries?" If you have it ought to show to which of those station- expenses were charged.

A. Yes sir, I have. That is included in the sundries.

Q. On page 12——

A. But there is an explanation there.

Q. Turn now, to Exhibit No. 33, and I will get you to state what disposition, from the books, was made of the receipts from transportation, aggregating $1,248,725.88 for the year ending November 30th, 1865 and what distribution thereof, if any, was made on the secretary's report.

1159 A. On the books there is charged to transportation account for United States revenue taxes, $34,398.13; for various items, classified by the secretary, operating expenses, $615,656.96; subscription to volunteer fund, $5,000; surplus account, $593,670.99; making a total of $1,248,725.88. In the secretary's report, for the year ending November 30th, 1865, pages 9 and 10 it is classified as operating expenses, $615,656.96; Government tax, $34,398.13. Net transportation receipts, $598,670.

Mr. WILLIAMS: Net transportation receipts?

The WITNESS: Yes, that is what it is called here.

Mr. WILLIAMS: Under the head of operating expenses?

The WITNESS: No sir; leaving, I said net transportation.

Mr. WILLIAMS: Leaving net transportation?

The WITNESS: Leaving net transportation receipts $598,670.79.

Q. Is there any specific detail on the report, of the operating expenses, aggregating $615,656.96?

A. Yes sir.

Q. Give us the details of it?

A. Running road, consisting of train expenses——

Q. I do not care about the further details, but the general details, running road, and so forth, road repairs and so forth.

A. Running road $146,046.64; road repairs, $197,704.36; machine shop, $149,057.37; general expenses, $122,648.59. The secretary reports net transportation receipts, $598,670.79, while the amount transferred to the credit of surplus is $593,670.79.

Q. The difference is accounted for——

1160 A. The difference is accounted for by a subscription to the volunteer fund, of $5,000, which is charged on the books, to transportation account, and does not appear in the secretary's statement, in any form.

Mr. WILLIAMS: I think you will find it does, Mr. Duy.

The WITNESS: I mean to say it does not appear in that statement. Oh, yes, it is in the general statement.

Q. Have you anywhere a detail, either on the secretary's report, or on this exhibit, of the items of general expenses aggregating $122,648.59, that appears on page three of Exhibit 33?

A. It is included in the item set out on page two, and the top of page three.

Q. It is included in the item at the top of page two?

A. $615,656.86, it is a part of that.

Q. But there is no specific detail?

A. No separate detail; it can be checked over in a moment.

Q. Now, Exhibit No. 34, I will get you to state what charges to transportation account appear on the books for the aggregate of receipts from transportation, $1,049,720.28, for the year ending November 30th, 1856; and if any distribution thereof appears in the reports of the secretary, will you please point out such distribution?

A. On the books are charges of various items, classified by the secretary as operating expenses, amounting to $616,115.66;

1161 Government tax, $22,983.76; surplus fund, $410,620.86. On the secretary's report, for that year pages 9 and 10, transportation receipts of, $1,049,720.28, are classified as operating expenses, consisting of running road, $162,927.05; road repairs, $166,908.53 machine shops $149,083.35; general expenses, $137,196.73, making a total operating expenses of $616,115.66; Government tax, $22,983.76, making $639,099 42, leaving net transportation receipts, $410,620.86, which is the amount transferred on the books, to surplus account.

By Mr. PICKENS:

Q. What is the page of that report of the secretary?

A. Nine and ten, I think it was.

By Mr. KETCHAM:

Q. Go to Exhibit No. 35, and give us the charges against transportation receipts, as they appear on the books for the year ending November 30th, 1867, and show the disposition, so far as the books are concerned, of the receipts $1,075,513.55; and if any distribution was made on the books of the secretary, state where and what that distribution consisted of?

A. The charges on the books against transportation account consists of sundry accounts, such as have heretofore been charged to operating expenses, amounting to $577,395.13; item, United States revenue tax, $12,567.67, carried to surplus account, $485,550.75. In the secretary's report of that year there is no statement of the disposition of the transportation receipts, separately, as there
1162 has been heretofore. There are some explanations there that come in.

Q. What amount is shown by the secretary's report, as constituting operating expenses, the secretary's report, for the year ending November 30th, 1867?

A. In his statement, No. 1, which embraces all the receipts, and the aggregate expenditures, the operating expenses are set down at $644,330.13.

Q. Where do you get the difference between the $577,395.13, and the $644,330.13?

A. The difference between the amount of operating expenses reported by the secretary, and the amount charged on the books is $66,935. On page 114, Journal D, profit and loss is charged and Chauncey Rose, trustee, is credited for a difference between the cost and present value of the company's own stock, held by him, $65,935., and on page 113 is an entry charging surplus account with a donation to Vigo County Agricultural Society of $1,000., which sums aggregate $66,935. The date of those entries is November 30th, 1867.

Mr. HAWKINS: So that those entries were made at the close of the fiscal year 1867?

The WITNESS: Yes sir.

Q. But I do not see how it gets into transportation account?

A. It is not in transportation account.

Q. As a matter of fact, then, this $66,935., referred to in the report of the secretary, for that year, did not go into the transportation account at all?

A. It does not appear in the transportation account, and he
1163 did not so report it; he reports operating expenses which amount to that much more than the book shows.

Q. He reports it as part of operating expenses?

A. I did not say that; he reports as operating expenses just that much more than the book shows.

By Mr. HAWKINS:

Q. He reports as operating expenses $644,630.14, and the books show operating expenses $577,395.13?

A. And we do not find any other amount that would account for the discrepancy.

By Mr. KETCHAM:

Q. What was that Vigo County society that a thousand dollars was donated to?

A. The Vigo Agricultural Society?

Q. The $1,000 transaction and the $65,935, in fact went through the surplus account, did they not?

A. The $65,000 transaction is charged to profit and loss account.

Q. And the profit and loss account eventually brings up into the surplus account. Now, take Exhibit No. 36, and give us the amounts charged to transportation for the year ending November 30th, 1868, and if there is any distribution thereof by the secretary, give us that.

A. The amount charged to transportation account on the books, various items of expenditure amounting to $590,587.08; United States revenue tax, $11,408.59; surplus account, $493,010.30; making a total of $1,095,005.97; and the report of the secretary for the year ending November 30, 1868, pages 8 and 9, statement A, operating expenses, "running road," $163,500.08. "Repairs of road," $170,019.78; "repairs of bridges, buildings, &c.," $15,756.99;
1164 "repairs of machinery," $124,581.25; general expenses, $116,728.98; total operating expenses, $590,587.08; "net transportation earnings," $504,518.89. He reports net transportation earnings, $11,408.59 more than was credited to surplus account in the books, and the difference is accounted for by the charge for United States revenue tax, $11,408.59. That is to say, in his statement of the disposition of transportation earnings he has omitted the item of revenue tax.

Q. Now, take Exhibit No. 37, and give the details of the charges against transportation account for the year ending November 30, 1869, $1,190,869.87.

A. The charges on the books are for various accounts amounting to $593,112.41; credit to surplus account $597,757.46. The expenditures are classified in the secretary's statement A, pages 10 and 11 of report for November 30, 1869, as operating expenses, "running road," $188,501.05; "repairs of road," $131,277.93; "repairs of bridges, buildings, &c.," $20,153.71; "repairs of machinery," $120,432.10; "general expenses," $132,747.62; total $595,112.41, leaving net transportation earnings $597,757.46, which is the same amount as was transferred to surplus account on the books.

Q. There is in this year no separate account of taxes and other similar items in previous reports unless it appears under the head of general expenses, is there?

A. No sir, no such items in connection with the statement of transportation account, but there are such items in another statement—general account.

Q. Now, take Exhibit No. 38, and give us the amount of
1165 charges to transportation account for the year ending November 30, 1870, with the details thereof, if any details were made by the secretary in his printed report.

A. Amount in 1870, charged on the books against transportation account is for various items heretofore classified as operating expenses amounting to $628,061.44; amount carried to surplus account $459,465.05. In the secretary's report for that year, on page 8, statement A, he reports operating expenses, classified as heretofore, "running road," $209,916.99; "repairs of road," $143,329.65; "repairs of bridges and buildings," $25,83[illegible].98; "repairs of machinery," $120,686.66; "general expenses," $132,288.16. Total, $628,465.05; which is the same amount as on the books is credited up to surplus account.

Q. I will ask you to go back a moment to operating expenses for the year ending November 30, 1869, Exhibit No. 37. Does the item of road repairs enter into transportation account, ultimately as it appears in the ledger?

A. Yes sir.

Q. Turn to Ledger D, I suppose it is page 332.

A. It is Ledger C, probably.

Q. This is Journal D.

A. It is Ledger C.

Q. By what kind of an entry are the road repairs taken into the transportation account, or "repairs of roads"?

A. By an entry on the journal charging the balance of the account to general transportation, and a credit to repairs of road account.

Q. When was that done?

A. The 30th of November, 1869.

Q. That is at the expiration of the year when they were making up their accounts?

1166 A. Yes sir.

Q. What was the balance that went into this transportation acount, at the expiration of the year, that year, from repairs of roads?

A. $126,140.10.

Q. That is the second item on the debit side of the account as shown in Exhibit No. 37?

A. The first item.

Q. Now, I will call your attention to an item of road repairs on page 304 of the journal under date of July 8, 1869, $5,000, and I will get you to give to the master the entries in relation thereto. What is the entry on the journal?

A. The entry on the journal is "sundries to treasurer, road repairs, for amount paid sundry persons on account of road repairs, $5000."

Q. And to what page in the ledger is that period?

A. Page 332, Ledger C.

Q. Turning to Ledger C, at page 332, I will ask you if that amount is there charged to road repairs?

A. It is.

Q. And is included in the net amount of $126,140.10, that at the end of the year goes to transportation?

A. Yes sir.

Q. Now, I will call your attention to an entry of station expense, on July 8, 1869, $3,000, and I will get you to state whether that station expense—in the first place, what is the entry on the journal?

A. Part of the entry of "sundries to treasurer, station expense for same, on account of station expense, $3,000." Above, it is "for amount paid sundry persons on account of road repairs,"

1167 and this entry is "for same, on account of station expense."

Q. Is there still a third entry as a part of that transaction?

A. There is.

Q. What is the third entry?

A. Foreign agencies and commissions, "For same, on account of foreign agencies and commissions, $2,000." The total entry is credited to the treasurer, $10,000.

Q. Now, go to the station expense on the ledger, page 338, and I will ask you if that amount of $3,000. constitutes a part of the amount of $70,533.75. stated on Exhibit No. 37, as being the station expense charged to transportation during that year.

A. Yes sir.

Q. Now, I will get you to go to page 340, of Ledger C, to which the item of $2,000 on account of foreign agencies and commissions is posted. Do you find that posted there?

A. Yes sir.

Q. I will ask you if that amount of $2,000 is included in the total amount of $16,851.25, entered at the close of the year into transportation account, on page 2 of Exhibit No. 37?

A. It is.

Q. Now, I will get you to go to the treasurer's cash book under date of July 18, 1869, page 131, and give us the explanation of those items.

A. There is nothing on the treasurer's book to account specifically for those items.

Q. What is the entry?

A. The only entry that balances them is on the credit side of the treasurer's book, "1869, July 8, secretary's warrant to W. R.

1168 McKeen, $10,000."

Q. One item?

A. One item.

Q. What is the explanation of what the item was given for?

A. There is nothing but what I read.

Q. Is there a reference to the journal for an explanation?

A. No sir; number of voucher, no number of warrant; just what I read, nothing else.

Q. I will get you to look at the amount of road repairs, station expenses and foreign agencies and ask you to state whether in the

entries made prior thereto and subsequent thereto, there is any explanation with reference to the number of the warrant or the number of the voucher, either on the journal or on the ledger or on the treasurer's cash book?

A. All the way through the books it is true that it has been the habit of the book-keeper to enter a number which we took to be the number of the voucher on the journal. I was going to say—I am stating from memory—in the early part of this book-keeping all these things were charged on the journal daily as they were paid out, and the name of the party was given, and very often the items, what it was for, and the numbers of the vouchers were always given. Along in the latter part of the business those items must have been kept on some intermediate book, because they are aggregated here on this journal, on one item "for repairs of road," and so posted; and sometimes there is the number of the vouchers and sometimes not. What I mean to say is that they — aggregated in one entry on the journal, the treasurer is credited with the whole month's business, and each of these accounts are put in one item, and
1169 it is very difficult for me to explain it without you look at the book. On page 322, in an entry which covers the page, crediting the treasurer with sundries, there is a charge to repairs of road, on the 31st of July, 1869, and four numbers above that there is a number which designates something, either a page of a book from which these were taken, or the number of the warrant or something of that kind, 206, 207, 208, 209, 210 and so on down. That repairs of road is in that space (indicating). On page 330 is another entry of the same character.

Q. That following the number 214?

A. Following the number 214.

Q. And these numbers appear in regular order, 212, 213, 214, and so forth?

A. Yes sir.

Q. Now, if the entries in regard to this amount of $10,000, on page 304 of the journal are similar in character, or different in character from those that you have just pointed out, you may state, and describe the respect in which they resemble, or are different.

A. The entries preceding it for some time containing charges to these accounts are made at the expiration of the month, and are included with other entries containing a large number of items, apparently representing the month's business summarized. In such entries in most cases the name of the account is given simply with the amount, and the number of the voucher, or receipt, or whatever it may be.

Q. And the page of the book?

A. Or the page of the book.

Q. Is there anything of that character in this?

A. The entry on page 304, which is the $10,000 entry, the
1170 title of the entry is at the other, "Sundries debtor to treasurer," but in the entry the various accounts which are charged there is a description of what the payment is for in each

instance, and there are no numbers of vouchers or receipts, or book pages.

Q. Where were you living in 1869?

A. Terre Haute.

Q. Did you have any acquaintance with the business of the Terre Haute road at that time, its methods of doing business?

A. No sir.

Q. What business were you engaged in at that time?

A. I was practicing law.

Q. Within your knowledge, what did Mr. McKeen have personally to do with the repairs of the road or the running of the stations, or dealing with foreign agencies and commissions?

A. Nothing at all to my knowledge. So far as I know, I should say.

Q. Do you recollect the year when Governor Cumback was a candidate for the United States Senate and when Senator Pratt was elected United States Senator?

A. No, sir, I cannot locate any year by that description.

Q. Were you familiar with the history of the General Assembly of Indiana during the year 1869?

A. Not at all, no sir.

Q. Do you recall when a committee consisting of Senator Osborn, Senator Hughes, Mr. George Buskirk and Mr. John R. Coffroth was appointed to investigate the questions as to whether there was a liability to the State by the Terre Haute & Indianapolis road?

A. I remember that there was a committee which I under-
1171 stood was appointed by the legislature. I cannot recollect the person-el of that committee, except Mr. Osborn, I remember he was upon it; Harvey D. Scott was with the committee, whether as a member or not, I don't know; nor can I fix in my own mind the year that the committee of which I am speaking was appointed.

Q. Take these entries as a whole, the entries on the treasurer's book, on the ledger, on the journal and the preceding and subsequent entries of a similar character, to these accounts, and I will get you to state as a book-keeper what, if anything, these entries, as compared with other entries, indicated with regard to that $10,000 payment?

A. Well, I cannot account for these entries on the journal, and those charges in any way other than by the entry of cash charged and stated to be paid to Mr. McKeen. We have compared the treasurer's account on the journal with his cash book, and I do not find any other explanation of that $10,000 entry, and I am forced to the conclusion as a bookkeeper, that one of these entries balance the other.

Q. Was there an account on the books with Mr. McKeen, either on the ledger or on the journal?

A. There don't appear to be any account with W. R. McKeen on this ledger at this date, or at any date, and I have no recollection in going over the whole of these books of seeing any such account at any date.

Q. Turn to the account of salaries, and see if you can find how the salaries of the president was paid and entered, what, if any, entry there is in connection with that? There is an account of salaries, is there not?

A. Yes sir, but it is quite lengthy.

1172 Q. On the books salaries seem to have been paid in one item and credit given to the treasurer for the amount.

A. That year they were paid in quarterly payments, and were charged on the journal "salaries of officers," without any particulars. The amount was $2.750. a quarter.

Whereupon, the hour of twelve o'clock and thirty minutes having arrived, the further hearing was discontinued until two o'clock p. m.

THURSDAY, *October* 5, 1899—2 o'clock p. m.

The parties met pursuant to adjournment.
Present, the same as before recess.

The examination in chief of the witness, GEORGE C. DUY, was resumed as follows:

Questions by Mr. KETCHAM:

Q. Right in this connection, Mr. Duy, I wish you would turn to Journal E, page 302, and see if you find another entry of that character? Do you find any entry there of the payment of any sum of money, say the sum of $9,000?

A. I find an entry on that page dated April 12, 1873, "Profit and loss to J. H. Hager, treasurer, for secretary's warrant, No. 148, March 25, 1873, in favor of W. R. McKeen, president, covering legal and other expenses, while attending State legislature

1173 during the winter of 1872-3, $9,000."

Q. That, I understand, was charged to profit and loss?

A. Yes sir.

Q. Profit and loss is one of the accounts that eventually find their way into the surplus account?

A. If there is any balance at the end of the year it goes to the credit of surplus, and sometimes the other way. Sometimes profit and loss is made up from surplus. Practically they are the same account. Surplus might be called undivided earnings.

Q. Now, I wish you would take Exhibit No. 39, being transportation account for the year ending November 30, 1871, and I will get you to state what amounts were charged to transportation account during that year, and how they were distributed, if they were so distributed on the secretary's report?

A. In that year there was charged to transportation account various items of expenditure amounting to $591,787.63, and to surplus account, $410,933.11. On the secretary's report for that year, page 9, statement No. 1, the amount is distributed or classified, "operating expenses," "running road," $208,940; "repairs of road," $126,698.23; "repairs of bridges, buildings, etc.," $10,982.73; "re-

pairs of machinery," $110,198.18; "general expenses," $134,968.49, making a total of $591,787.63, leaving net transportation earnings $410,933.11; which is the same amount as is transferred to the surplus account on the books.

Q. Now, I wish you would go to Exhibit No. 40, and state what amount of the receipts from transportation were charged to various accounts, and give the details thereof.

1174 —. On the books or charged to transportation account, sundry balances transferred, being for the transportation expenses for the year ending November 30, 1872, to-wit: Conducting transportation, $203,741.22; motive power, $224,360.45; maintenance of way, $227,430.87; maintenance of cars, $71,554.05; making a total of $727,086.59; and to profit and loss account, being net transportation for the year, $343,267.81. In the secretary's report for that year on page 9, transportation account recites and classifies as operating expenses the four items above mentioned, amounting to $727,086.59, and he classifies as net transportation earnings, $343,267.81; which is the same amount credited to profit and loss on the books.

Q. Now, going to Exhibit 41; on that exhibit you have got at the net earnings by taking one-eighth of the amount for the entire year?

A. Yes sir.

Q. In what manner in that account for the year does the item of $9,000 paid for legislative and other expenses enter—to increase or diminish the net transportation receipts, if at all—or does it appear in transportation in any way?

A. The balance of transportation earnings for the previous year, are credited to profit and loss account, and this charge in 1873, of the $9,000 is charged out of profit and loss account. It would not appear in any way in the transportation account, nor would it necessarily lessen the balance to profit and loss in the previous year because the $9,000 might have been made in 1873, although not credited to profit and loss at that time.

Q. So far as this result, on the transaction of the six

1175 weeks—we only get at the transaction during those six weeks by taking the average for the year?

A. Well, we got at that so far as the transportation earnings for this year are concerned, by taking the gross transportation receipts for the year 1873.

Q. Now, I wish you would produce your statement No. 31. I will ask you if you have prepared a statement showing the transportation account from the beginning to the 30th of November, 1872, with a statement of the operating expenses charged to the account, showing the net transportation earnings through that entire period.

A. We prepared a consolidation of the transportation account, as heretofore exhibited, from the beginning to November 10, 1872, which shows the aggregate of the gross earnings, and shows also the aggregate of the operating expenses as classified by the secretary,

and the net earnings remaining, and it also shows other items, or the total of other items, charged to transportation account during the whole year.

Q. So that this exhibit, as you have prepared it, will show, as it appears upon the books of the company, going to the secretary's statement for classification and distribution, what the total receipts from transportation were, what the total operating expenses were, and what the total of other charges were to the transportation account, as appears upon the books of the company during that period?

A. Yes sir, and what the total net earnings are also.

Q. If you have prepared a typewritten copy of this original statement, I wish you would produce it and hand it to the reporter to be identified as Exhibit No. 42.

A. I have such a copy, prepared and verified, and now produce it and hand it to the reporter.

1176 The typewritten copy of Mr. Duy's statement No. 31 was marked by the reporter "Exhibit No. 42, October 5, 1899, W. S. G."

Q. Now, as shown by the books, I wish you would state to the master what were the gross transportation earnings from the beginning of the company to the 30th of November, 1872.

A. $14,512,911.19.

Q. What did the operating expenses as distributed by the secretary in his various reports aggregate up to and including the 30th of November, 1872?

A. The operating expenses for that period as classified by the secretary, except, I think in one year only he failed to make a classification, and in which year I put in the same character of charges, as he had theretofore called operating expenses, amount in the aggregate to $7,249,016.37.

Q. What were the total net earnings to November 30th, 1872?

A. $7,263,894.82.

Q. In what manner were the charges to transportation account of this aggregate of $7,263,894.82 entered upon the books of the company? Give the classification and the amount of each.

A. The various items classed as additional expenditures $155,136.94; State and county taxes—I think that should be State, county and city taxes; I think there was some item of city taxes—$48,881.97; internal revenue taxes, $81,358.15; subscription to volunteer fund, $5,000; interest on bonds, $25,586; interest and exchange $192,722.63; dividends on stock, $889,441; credit to profit and loss, $562,245.95; credit to surplus fund, $5,309,522.27;
1177 total $7,263,894.82.

Q. I will call your attention to some items that appeared in these exhibits as we went along, among others, the donations to the State fair, and Vigo Agricultural Society; I will ask you what the fact is as to whether every item of expenditure appearing in the transportation account, other than these last items, aggregating

$7,263,894.82, were charged, appear in, and are included in the items aggregating $7,249,016.37, designated as the operating expenses to November 30, 1872.

A. Yes sir.

Q. As we were going over the exhibits in some instances it appeared that the dividends charged came from surplus fund. I will ask you if those dividends are in this recapitulation included in the item of $889,441. described as dividends on stock, or whether they are included in the items of $5,309,522.27, described as surplus account?

A. The item here, dividend on stock, is charged to transportation account alone. Other dividends that were paid came out of the surplus account, or the profit and loss account, so stated here.

Q. And of the amount of $192,722.63, described as interest and exchange, what amount is the interest upon the bonds of the company?

A. I do not think any of that, because there is an item just above it of interest on bonds. Yes, of that amount of $192,722.63 charged on the book to transportation account, there was $187,359 interest on the company's bonds.

Q. And that is in addition to the item of $25,586?

A. Yes sir.

1178 Q. Of the same amount of $81,358.15 internal revenue tax what portion is the amount that was charged on account of tax paid on dividends?

A. $55,412.48.

Q. I will call your attention on page 9, to the items of $165, and $498.30 appearing in the first column under the head of sundries, on Exhibit 42, page 9—the first column there right at the top, or almost at the top, $165, and almost at the bottom is the donation to the State Fair grounds, $498.30, carried out in the item, $1,527.11, and then, on page 10, there is another item, donation to fair grounds $234.30—and I will ask you if it is not true that the specific details of the $7,263,894.82 are not fourth under the head of sundries in the first column of the exhibit?

A. Yes sir.

Q. So that, where we find anything in that column on the books, it is not included in the item of operating expenses, and is included in the additional expenditures and other items, composing the amount here, $7,263,894.82?

A. Yes sir.

Q. Now, if you have any explanation to make of your previous answer on that, I wish you would make it.

A. In answering your former question as to the donations and so forth being included in operating expenses, I did so entirely from memory, and was mistaken as to the fact. Upon looking at the consolidation Exhibit No. 42, I find the three last items mentioned, $165, $498.30 and $234.30, were not included in the operating expenses.

1179–1213 Mr. KETCHAM: Now, may it please the master, I will introduce in evidence, Mr. Duy's statement No. 31, which the reporter has marked "Exhibit No. 42."

The statement, being Mr. Duy's statement No. 31, marked by the reporter as "Exhibit No. 42," was admitted in evidence; the same being found in words and figures following, to-wit:

(See next page.)

1214–1216 Q. Now, I will ask you if you have prepared an exhibit or a statement showing a recapitulation of transportation earnings year by year from the beginning to November 30, 1872, inclusive, showing in detail the amount of operating expenses, interest on bonds and other accounts to which the debtor items of the transportation account were charged including a detail of additional expenditures, and also the detail of operating expenses?

A. Yes sir.

Q. And if you have prepared such exhibit, I will ask you to produce it, and if you have a typewritten copy thereof, hand it to the reporter and I will ask him to identify the same as Exhibit No. 43.

A. I have such a statement which I produce, with a typewritten copy, which I hand to the reporter.

The statement, being Mr. Duy's statement No. 32, was marked by the reporter "Exhibit No. 43, October 5, 1899, W. S. G."

Mr. KETCHAM: Now, I will offer Mr. Duy's statement No. 32, marked Exhibit No. 43, in evidence.

Mr. Duy's statement No. 32, being Exhibit No. 43, was admitted in evidence; the same being found in the words and figures following, to-wit:

(See next page.)

1217–1259 Q. I will ask you, Mr. Duy, if you have prepared a statement showing the dividends in cash and stock that were made by this company from the beginning to the last dividend declared prior to January 17, 1873? If so, will you produce it, and if you have a typewritten copy of it, I will ask you to hand it to the reporter to be identified as Exhibit No. 44.

A. I have such a statement, a typewritten copy of which I hand to the reporter.

The statement, being Mr. Duy's statement No. 61, was marked by the reporter "Exhibit No. 44, October 5, 1899."

Mr. KETCHAM: Now may the master please, I offer Mr. Duy's statement No. 61, marked Exhibit No. 44, in evidence.

The statement, being Mr. Duy's statement No. 61, marked "Exhibit No. 44," was admitted in evidence; the same being in the words and figures following, to-wit:

(See next page.)

1260 Q. What were the total amount of dividends paid in cash?
A. $3,834,701.42.
Q. What was the total amount paid in stock?
A. $588,300.
Q. And the total?
A. $4,423,001.42.
Q. On page 4 of this exhibit, I observe a note to the effect that in the dividend of 1855, $964.50 appeared not to have been paid, and on page 5, there appeared to have been $1,587.50 not paid, on this dividend in 1856, and on page 6, there appears a balance of $1,077.64, not to have been paid. Were those dividends subsequently paid, or do they appear, or what disposition was made of those moneys on those dividends?
A. When the dividends were declared, the amount was credited to dividend account, and as it was called for from time to time, or upon report of payment to the eastern stockholders in New York, dividend account would be charged with the amount that was paid, and almost every time there was a balance remaining unpaid, which was carried down to the credit of dividend account before a new dividend was made and credited. At first it was comparatively easy to ascertain the numbers of the dividends upon which these amounts remain unpaid, and it was so noted, and after that, it got so complicated that we could not divide them, and it was just carried down unpaid dividends, from time to time.
Q. Under date of November 30, 1857, page 6, after giving the amount of unpaid dividends, aggregating $10,799.64, there is a specification "Paid John Rose, not specified," $9,722. On account of what dividend, if you recollect, was that dividend paid to Mr. Rose?
1261 A. It is not specified what dividends it was paid to Mr. Rose upon, but it was paid upon dividends which had heretofore been declared and that run down as far as No. 10, I think.
Q. To what extent was Mr. Rose a stockholder, if you know from the books?
A. John Rose owned a large amount of stock. John Rose owned at one time over $200,000 worth of stock, at the time of his death, but I don't remember at this date; I cannot tell without looking at the stock ledger. I think he owned $231,000 worth.
Q. On Exhibit No. 4, page 12, I wish you would turn to the journal for 1852, at page 159, and give us the entry with regard to the issuing of that stock.
A. The entry is "Contingent account to capital stock, for certificate for two hundred shares of stock issued to John Rose of New York, per order of the board of directors at meeting Tuesday, August 3rd, being for service renderad company by the negotiating and sale of $600,000 of bonds; sale of stock and other assistance, for which he made no charge, $10,000, under date of August 6, 1852."
Q. What was the contingent account?
A. I don't know that I can answer that question.

Q. Turn to it and let us see what it is. Secretary's Ledger A, page 77.

A. Well, it seems to be an account to which they charged various items of expenditure, for which there was no special account, and no other place to put them, and that year I can give you briefly the items which make up the contingent account.

Q. How many of them are there?

A. Six or eight items.

1262 Q. Give us the items for that year of the contingent account.

A. Oh, this is for six months.

Q. Well, for the period that you have before you there, six months.

A. The first item is the charge which I have already read, $10,000.

Q. That opened the account?

A. That opened the account for that six months. The next item is to C. Rose, for salary and rent, $547.50. Keeping horse $31. Sundry amounts paid $12. Printing $2. and $56.75, and McQuat, for sundries, $2.50; collecting, $16. A. Daggy, $18.37. Ditto, $207.08; W. Sheets, stationary, $202.97. It seems to have been an account in which they lumped up various little expenditures in 1852.

Q. At the close of the year it was charged into construction account?

A. At the close of that year, 1852, it was charged to construction account. That is where that finally went, that ten thousand dollar item.

Q. There is no other corresponding entry for this ten thousand of stock that was issued? That is all there is of it, is it?

A. This is all. I don't recollect that there was any contingent account kept after the close of 1852. There may have been, but I don't recollect.

1263–1284 Q. Now, I will ask you if you have prepared a statement showing earnings from sources other than transportation from interest and profit and loss, and surplus account, from 1849, to 1872, inclusive? If you have, will you produce it, and hand the typewritten copy thereof to the reporter, to be identified by him as Exhibit No. 45?

A. I have prepared such a statement, and produce a copy which I have to the *the* reporter. It is my statement No. 33.

Mr. Duy's statement, No. 33, was marked by the reporter Exhibit "No. 45, October 5, 1899, W. S. G."

Mr. KETCHAM: May the court please, I will offer this statement in evidence.

The statement being Mr. Duy's statement No. 33, marked "Exhibit No. 45," was admitted in evidence, the same being in the words and figures following, to-wit.

(See next page.)

1285–1364 Q. I will get you to state what were the total receipts during that year, from interest.

A. Total earnings from interest to November 30th, 1872, $87,181.24.

Q. Right in this connection I will ask you if you have made an itemized statement of the interest account, and if you have a typewritten copy thereof, will you produce both and hand the typewritten copy to the reporter, to be identified as Exhibit "No. 46"?

A. I have prepared such a statement, it being statement No. 49; and I hand the reporter a copy.

Mr. Duy's statement No. 49, was marked by the reporter Exhibit "No. 46, October 5, 1899, W. S. G."

Mr. KETCHAM: I will now offer Mr. Duy's No. 49, which the reporter has marked Exhibit "No. 46" in evidence.

Mr. Duy's statement No. 49, marked Exhibit "No. 46," was admitted in evidence; the same being found in the words and figures following, to-wit:

(See next page.)

1365 Q. What is the total interest account appearing on Exhibit No. 46?

A. $590,576.68.

Q. How do you arrive at the conclusion, then on Exhibit No. 45, that the total earnings from interest, was $87,181.24?

A. There is a good deal of interest there, that I do not consider earnings.

Q. How do you arrive at that, so that we can understand it?

A. You get the earings on the credit side, not on the debit side—interest received. The details are all set out.

Q. The details are all set out on this Exhibit No. 45?

A. Yes sir, 46 is the itemized interest account, statement 49 but Exhibit 46. Exhibit 46 is the itemized statement of the whole interest account. Exhibit No. 45 contains on pages one to six, the items received which would appear to be earnings.

Q. The difference, $503,623.94, shown by the memo. at page 6 of Exhibit No. 45, is composed of what items?

A. Probably of receipts and earnings otherwise accounted for.

Q. Now, what were the earnings during this period, from the profit and loss account?

A. $164,470.70.

Q. That is shown on Exhibit No. 45, page 7?

A. Pages 7 and 8.

Q. Now, what were the earnings from surplus account, surplus fund?

A. $425,143.23.

Q. That appears at pages 9 and 10?

A. Pages 9 and 10 of Exhibit No. 45.

Q. And what were the total earnings, as shown on Exhibit 45, as shown on page 13?

A. $676,795.17.

1366 Q. If you have a prepared copy of the itemized surplus account, from the beginning, to November 30, 1872, will you produce it? and also a typewritten copy thereof, if you have it, and hand the same to the reporter, and I will ask him to identify it as Exhibit "No. 47," the same being statement No. 47.

A. I have such a statement and copy, and produce them.

Mr. Duy's statement No. 47 was marked by the reporter, Exhibit "No. 47, October 5, 1899, W. S. G."

Q. What was the total balance of the surplus account November 30th, 1872?

A. $1,186,143.12.

Q. Now, on Exhibit No. 45 you have given the earnings from surplus account as $423,145.23.

A. Yes sir.

Q. I will ask you if that amount includes to any extent a duplication of the earnings as they have been heretofore given from transportation account?

A. No sir.

Q. And I will ask you the same question with reference to the earnings in interest, and earnings in profit and loss, whether they are in any instance or to any extent a duplicate of the earnings that have been heretofore given as arising from transportation account?

A. I do not think they are in any instance. Certainly not in any considerable amount.

Mr. KETCHAM: I offer Mr. Duy's statement No. 47, marked Exhibit No. 47, in evidence.

1367–1391 Mr. Duy's statement No. 47, marked Exhibit No. 47, was admitted in evidence; same being in the words and figures following, to-wit:

(See next page.)

1392 Q. Now, I will ask you if you have prepared an exhibit showing the items of the profit and loss account from the beginning to November 30, 1872, and if so, will you produce it and hand a typewritten copy thereof, if you have it, to the reporter to be designated as Exhibit No. 48?

" I have prepared it, and produce a copy.

Mr. Duy's statement No. 48 was marked by the reporter "Exhibit No. 48, October 5, 1899, W. S. G."

Q. Now, I will ask you if you have prepared an itemized statement showing the profit and loss account for the year ending November 30, 1873, and if you have, will you produce it and hand to the reporter a typewritten copy thereof to be identified by him as Exhibit No. 48 A?

A. I have prepared such a statement and produce a copy.

Mr. Duy's statement No. 48 A was marked by the reporter "Exhibit No. 48 A, October 5, 1899, W. S. G."

Mr. KETCHAM: Now, if the master please, I will offer in evidence those two statements produced by Mr. Duy, No. 48 and No. 48 A, marked by the reporter respectively, "Exhibit 48, and Exhibit 48 A."

The statements, being Mr. Duy's statements No. 48 and No. 48 A, marked respectively Exhibits No. 48 and No. 48 A respectively October 5, 1899, W. S. G." were admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

1393–1423 Whereupon, the hour of four o'clock and thirty minutes having arrived, the further hearing was adjourned until tomorrow, Friday, October 6, 1899, at ten o'clock a. m.

1424 FRIDAY, *October* 6, 1899.

The parties met pursuant to adjournment.

Present: The same as on yesterday, with the exception of Lawrence Maxwell, Jr., of counsel for defendant, who was absent.

The examination of the witness GEORGE C. DUY, was resumed as follows, by Mr. Ketcham:

Q. Mr. Duy I will ask you to state if you find on the books of this company any account of a contingent fund, or any fund provided by order of the board of directors to meet contingent expenses?

A. No sir, I find no such account.

Q. I will ask you if there is in the minutes of the board of directors any order by the directors providing for the retention of any portion of the profits as a contingent fund to meet subsequent expenses?

A. So far as I know personally, there is no such order. I think there is no such order.

Q. I wish you would turn to the minute book and on page 1, under date of March 4, 1847, if you find an order for the opening of the books for subscription to the capital stock, you may read the order.

A. (Reading:) "Ordered that books of subscription to the capital stock be opened at Terre Haute, Greencastle, Indianapolis and Richmond, and that on each share subscribed two dollars shall be paid at the time of subscribing, for the purpose of meeting the expenses of surveys and the incidental outlays."

Q What is the date of that order?

1425 A. March 4th, 1847.

Q. Turn to page 4, and see if you find there under date of December 8, 1847, an order with reference to subscription to the capital stock, and if so, you may read it.

A. Page 4, December 8th, 1847: "Ordered that the books for subscription to the capital stock be reopened at Greencastle, Danville and Terre Haute, and continue open until further orders."

Q. Turn to page 5, under date of March 2, 1848 and see if you find there any order on the subject of subscription to stock?

A. March 2, 1848: "Ordered that the books for subscription of stock be reopened at Indianapolis on the 10th inst. and remain open twenty days, and that notice be given to the commissioners for receiving subscriptions to stock at the different points to close all books on the first day of April and forward to the president at Greencastle complete lists of stockholders, certified by the commissioner, with the number of shares taken by each, said lists to be sent by ten o'clock of the day of the election."

Q. Turn to page 10 under date of July 6th. See if you find there an order on the subject of stock?

A. It was ordered and directed that the president be and he is hereby authorized to draw on the different receivers of money paid in on the stock of the Terre Haute and Richmond Railroad Company for any money that may be necessary to pay the engineers and other persons that have been or may be employed on said road and incidental expenses thereof."

Q. Under date of January 5th——.

1426 A. (Interrupting.) I find another one on page 11; the same date, July 6th.

Q. In regard to stock?

A. Subscription to stock.

Q. Read it.

A. "It was ordered and directed that the stock books now open at Terre Haute, Greencastle and Indianapolis shall stand and continue open for the reception of stock until otherwise ordered and directed by this board, on the same terms as heretofore published, one dollar to be paid on the share at the time of subscribing." July 8th there is another one.

Q. July 8th is there another one?

A. Yes sir.

(By Mr. WILLIAMS:)

Q. 1848?

A. Yes.

(By Mr. KETCHAM:)

Q. Well, read it.

A. "The president, by the instruction of the board of the Terre Haute and Richmond Railroad Company renewed the appointments of commissioners to receive subscriptions for stock in said company made the second of April last, to take effect from the expiration of the appointments then made."

Q. Now, under date of 1850, January 5th, I think it is, no page given, see if you find any reference to the appointment of Captain

Morris to make a survey? It seems to have been a stockholders' meeting.

A. It is a copy of the First Annual Report of the President.

Q. Spread of record in the minutes?

A. Spread of record in the minutes. The book here is not paged.

1427 Q. The minutes of what meeting?

A. Stockholders' meeting.

Q. Of what date?

A. Dated before this January the 8th; it runs through quite a number of pages.

Q. Read so much of the report as refers to the appointment of Captain Morris to make survey.

A. "Soon after the organization of the company, the directors passed an order directing the president to employ a competent engineer to make an experimental survey of that part of the line which lies between Terre Haute and Indianapolis for the purpose of ascertaining the practicability and probable cost of constructing that part of the line, Captain Morris, an engineer of high standing was employed to make the survey. He entered immediately upon his duties with competent assistants and completed the survey on the first day of December, 1847, and soon after submitted his report to the directors, who ordered a number of copies to be printed for circulation, and doubtless the most of you have examined it." Then there is some more about the survey.

Q. Give us all there is about the survey.

A. "By an order of the board on the 19th day of September, 1848, Captain Morris was employed to make further examination and survey of that part of the line which lies between Terre Haute and Greencastle for the purpose of making a permanent location of the line between those points preparatory to putting the work under contract. After a full and careful examination of three different lines, he recommended the adoption of what is called the Southern line as being the shortest and cheapest line to construct, as

1428 will be seen by reference to his report. This report was approved of by the board and he was directed to prepare the line for putting under contract, which was done without any unnecessary delay, and on the 20th day of December, 1848, the clearing, grubbing and grading of 32 miles of road, and the building of a stone pier and abutment for a bridge across the Walnut fork of the Eel river was let to contractors at about six per cent. below the engineer's estimate, and 30 per cent. of the work payable in the stock of the company. Most of the contractors have prosecuted their work under the charge of Mr. W. D. Wood, the assistant engineer, to his entire satisfaction, two light sections having only been abandoned and one other section has not progressed as fast as we could have wished. We anticipate, however, no difficulty in having the whole completed as soon as we shall want to pay down the superstructure. A further survey and permanent location of most of the line between Greencastle and Indianapolis was made during the last sum-

mer, and a very favorable line obtained. The clearing, grubbing and grading of 20 miles of the road commencing at Indianapolis was put under contract on the 20th day of December, 1849 on favorable terms at an average of about 2 and ½ per cent. below the engineer's estimate and 28 per cent. of the work payable in stock of the company. There now remains a little upwards of 20 miles, including the two sections forfeited, to put under contract, the engineer's estimate of the clearing, grubbing and grading of which amounts to a little upwards of $52,000.00, and we have every confidence to believe that our stock subscriptions will be increased in a few months so as to justify our putting that part of the line, and the building
1429 of the stone piers and abutments for a bridge across White river, under contract the coming spring, so as to enable us to complete the grading of the whole line from Terre Haute to Indianapolis ready for the superstructure in one year from this time, and thereby secure the completion of the road between these two points by the first of December, 1851."

Q. Turn to the record of the report of the meeting of January 22, 1862, and I will call your attention to the report of the committee appointed to examine the cancelled bonds. I wish you would read in evidence that portion of their report. The page is not given.

A. That ought to be the meeting of January 7th.

Q. What page is it?

A. It is not paged. "On motion, Charles Wood——"

Q. (Interrupting.) Is it a meeting of the directors?

A. Meeting of the directors. "On motion, Charles Wood, E. J. Peck and F. Nippert were appointed a committee to examine the cancelled bonds and coupons of the company and destroy the same."

Q. Do you find a report by that committee?

A. This is at a meeting of the board January 22nd, 1862: "The committee appointed to examine the cancelled bonds and coupons make the following report: The committee to examine the cancelled bonds and coupons of the company that were issued of six per cent. bonds dated on 1850, payable in five years*m* due in 1855, $74,500, of which there has been $48,000 converted into the stock of the company, and $27,400 paid in cash, we find bonds cancelled as follows:" Amounting to $75,400, footed up.

Q. It should be $74,500, shouldn't it?

A. The issue was $75,400. "All of these bonds have been
1430 burned. We also find that of the seven per cent. mortgage bonds, payable in fifteen years from March first, 1851, due March first, 1866, that $600,000 were issued in bonds of $1,000 each; that there has been surrendered and converted into stock 370 bonds amounting to $370,000, leaving outstanding 230 bonds amounting to $230,000 as is shown by the secretary's books. We have also examined the coupons paid and find that they amount up to September first, 1861, $263,585.00. List of coupons seven per cent. bonds cancelled and this day destroyed." And then he gives a list

amounting to $263,585.00. "The cancelled bonds and coupons have been burned.

Respectfully submitted.

(Signed) CHARLES WOOD.
E. J. PECK.
F. NIPPERT.

Terre Haute, January 10, 1862.

On motion the report was adopted."

Q. Now go to page 45 of the minute book of the board at the meeting of January 1st, 1866 and find if you have there an order in regard to the payment of the seven per cent. bonds?

A. "It was ordered that the following advertisement be published in the city of New York. Notice is hereby given to the bondholders of the Terre Haute and Richmond Railroad Company, a corporation created under the laws of the State of Indiana, and now known as the Terre Haute and Indianapolis Railroad Company, that on the first day of March, 1866, seven per cent. bonds, first mortgage bonds of said railroad company will become due and payable, and that said company on that day become due and payable" (again, it is repeated) "pay said bonds in full of prin-
1431 cipal and interest, on presentation of such bonds with the interest coupons attached, at the office of the Farmers' Loan and Trust Company number 26 Exchange place New York. After the first day of March, 1866, the privilege of converting such bonds into capital stock of said company will cease and interest thereafter will not be collectible or paid thereon." "The president and secretary to approve the treasurer's bond."

Q. Go to the entry of January 8, 1867, page 63, and see if you find an entry there of instructions to the secretary as to what he should or should not report to the General Assembly.

A. "The board instructed the secretary that in case the legislature should request a statement in compliance with the 23rd section of our charter, not to include the stock dividends made in '56 and '64, but to add the same at the bottom of said statement with the notation that the said stock dividends were a part of and had been charged to construction account."

Q. Go to page 66, the meeting of April 5th, with reference to the cancellation of bonds.

Mr. WILLIAMS: April 8th, '67?

Mr. KETCHAM: April 5th, '67; page 66.

A. I find that entry on page 67: "The following report from the committee appointed to examine and destroy the seven per cent. bonds and coupons was read and adopted: T. H. April 2nd, '67. To the president and directors of the T. H. & R. R. R. Co. Gentlemen: The undersigned committee appointed to examine and can-
1432 cel seven per cent. bonds and coupons of the company would respectfully report that they found 225 cancelled bonds of $1000 each, amounting to $225,000.00; of this amount

$175,000 have been surrendered and converted into stock by sundry individuals and $50,000 paid in cash by the company on the first day of March 1866 and converted into stock in the name of the company. The following is a list of the bonds destroyed." Then he gives a list amounting to $225,000.00, and "destroyed January 10, 1862 $370,000.00; total number cancelled, $595,000.00 bonds still out, numbers 381 to 385 inclusive, $5,000.00 making an aggregate of $600,000; making the amount of seven per cent. loan made March first, 1851, for fifteen years by 600 bonds of $1000 each, amounting to $600,000.00, all of which *has* been cancelled except five bonds, numbers 381 and 385 inclusive, which are due and payable upon presentation."

Q. Anything further about those five bonds?

A. No sir.

Q. Now go to June 28, 1867, page 75; if you find an entry there with respect to bonds owned by the company, you may read it.

A. I do not find anything on that page.

Q. See if about that time you can find the entry. It is between the meeting of June 18 and the meeting of July 3.

A. June 28th; meeting of the board of June 28th, 1867, page 75.

Q. What is the action?

A. "By request of the following named gentelemen, Messrs. H. C. Lord, Stillman Wood, Amasa Stone, Junior, and T. A. Morris, they were granted an interview with the board of directors of this company, the object of this interview being to enter into negotiations with this company for the purchase of its stock so as to secure
1433 a controlling interest in the management of the road. The above named gentlemen having made known their wishes, the board unanimously declined to dispose of their stock in the Terre Haute and Indianapolis railroad."

Q. Now, I wish you would go to the report of the board of directors to the stockholders, and point out — that first annual report their reference to the employment of Captain Morris. Contained in the stockholders' meeting, January 1849; first annual report. State if you find there in that report the extract in regard to the employment of Captain Morris that has been heretofore offered in evidence from the minute-book.

A. Yes, it is here.

Q. That is in the printed report?

A. In the printed report, the first one.

Q. Now go to the eighth annual report for the year 1856. We have already introduced in evidence in connection with another matter a reference in that report to the capital stock, and were in doubts as to whether that portion of the report showing the condition of the road has been offered in evidence. If you find there "it is gratifying to remark the road is in good order" etc., I wish you would read that.

A. In presenting our report to the——

Q. (Interrupting.) What page is that?

A. Page 7. "In presenting our report to the stockholders at this

time it is gratifying to remark that the road is in good order, the entire line fenced, and is amply provided with motive power and rolling stock, and with all necessary buildings, without a floating debt, and a handsome surplus on hand to meet any ordinary contingency which may occur. Our confidence in its future prosperity is undiminished."

1434 Mr. WINTER: There is another extract on page 3 of that report; I don't know whether that had been introduced: "We have now increased our rolling stock so as to meet all demands upon us."

Q. Do you find that? You may read it.

—. "We have now increased our rolling stock so as to meet all demands upon us, and as the different lines in connection on the east and west have added largely to theirs, we trust the delays will be of infrequent occurrence, and when the completed line direct from Terre Haute to St. Louis is finished, will be entirely obviated."

Mr. KETCHAM: Instead of these extracts that are introduced we will offer in evidence the whole report of October 30, 1856. The eighth annual report.

The report, being the eighth annual report of the Terre Haute and Indianapolis Railroad Company, for the year 1856, was admitted in evidence and marked by the reporter "Exhibit No. 49, October 6, 1899, Evans, Rep.," the same being found in the words and figures following, to-wit:

(See next page.)

1435 EXHIBIT No. 49.

(October 6, 1899. Evans, Rep.)

Eighth Annual Report of the President and Directors of the Terre Haute and Richmond Railroad Company to the Stockholders.

1436 Report.

Eighth Annual Report of the President and Directors of the Terre Haute and Richmond — Company to the Stockholders.

Having changed the termination of our fiscal year—from the 31st day of December to November 30th—the statements herewith contain only seven months of the business operations of the road.

The receipts during this period show a large increase over preceding years, as will be seen by the secretary's report hereunto annexed. The almost entire suspension of western river navigation, during the summer and fall, caused a very large amount of -reight and travel to be thrown on the railroads. At one period of the season so greatly had the freight increased as to render it impossible

to forward it in the ordinary time, and although in some instances attended with delays and disappointments, these were no greater than has been experienced on most of the roads in the West the present year. We have now increased our rolling stock so as to meet all demands upon us, and as the different lines in connection, on the east and west, have added largely to theirs, we trust the delays will be of unfrequent occurrence, and when the contemplated direct line from Terre Haute to St. Louis is finished will be entirely obviated. In common with all other eastern lines terminating at Indianapolis we have a deep interest in its early completion, and hope soon to again see it put under contract. This, when completed, will form the great through line from the Atlantic cities to St. Louis, and if constructed with economy must prove one of the best paying roads of the West.

1437 There has been added to the equipment of the road, the past year, two passenger and two freight engines of the first class, three passenger cars, two baggage cars, sixty house cars, twenty-four covered stock cars (fourteen of which were built, and fourteen gravel cars rebuilt in company's shop). Three hundred tons of rails were purchased to replace the ordinary wear. At Croy's creek a new bridge with substantial stone abutments has been completed. Three new water stations have been eracted. At Indianapolis we have built a machine shop, and the road bed and track has been maintained in the best order.

On the night of September 9th the blacksmith shop, at Terre Haute, was injured by fire; this has been repaired at an expense of some fifteen hundred dollars. The walls being uninjured, a temporary shed was erected, and the usual business of the shop carried on with but slight interruption. The building has been raised three feet higher, and rendered more secure from fire by being covered with tin. The extreme dryness of the season has caused some loss of fences by fire, which were immediately replaced. A stone quarry was opened near Greencastle, on a lease to the company (from which was obtained the material for abutments at Croy's creek,) for the purpose of obtaining stone for use of the road, with a view to replacing all the wooden bridge abutments and culverts on the line with substantial masonry the next season. In consequence of the difficulty of getting a particular size of timber, in case of emergency, it was deemed expedient to purchase two tracts of wood land on the line of the road, as the land when divested of the timber will be worth the price paid for it, the investment, besides being a great convenience in furnishing building timber and fire wood, will be no loss to the company.

1438 The receipts for transportation show nothing for carrying U. S. mail; the reason is as follows: In May, 1852, a contract was entered into for two years to carry the mail, six trips weekly, for one hundred dollars per mile per annum. At the expiration of that contract it was not renewed; the service was continued, and quarterly payments made as usual. In July, 1855 a communication by railway was opened between Terre Haute and St. Louis, via the

Evansville and Crawfo-dsville road to Vincennes, and then by the Ohio and Mississippi road, making much the shortest line between St. Louis, Cincinnati and the eastern cities. And the Great Southern and Western mail was immediately placed on the road, by W. J. Brown, special mail agent, who gave assurance that the Post Office Department would pay a fair compensation for the greatly increased service, both on account of matter transported, and twelve trips weekly in place of six, as formerly. Quarterly payments at the rate of one hundred dollars per mile only, were made as before for a mere local mail service up to the 31st day of December, 1855, and the department having refused any additional compensation for the extra service, which was less than half the compensation allowed to other roads for similar service, we were constrained to notify the department on the 1st of March, 1856, that, unless these matters were satisfactorily adjusted, before the 1st of April, the company would decline the service after that date; to this, as well as to the previous communication on the same subject, no answer was received; and, according to notice, the mail service ceased, and to this day have received no compensation for the additional last quarter's service: There being no other remedy left, suit has been instituted in the Court of Claims for the balance due. We regret that
1439 we cannot accommodate the public with a regular mail, but justice to the stockholders forbids our carrying it for one half the compensation paid all other main lines for similar service. The amount received for the last quarters that we performed the service was not equal per hundred pounds to our regular tariff of freights. So soon as the department feels disposed to allow us a reasonable compensation, the people are assured that they will receive their mail in due season.

In settlement with the Columbus and Shelbyville railroad for transportation of iron for that company, there was taken in part payment, two eight per cent. second mortgage bonds of the Madison and Indianapolis Railroad Company, for one thousand dollars each; they were taken at eighty cents, their current value.

On the night of the 24th of April, a passenger, laboring under the influence of liquor, either fell or jumped from the express train while under way, near Greencastle, and was so much injured as to cause his death. On the 30th of August a man was killed, by the accommodation train on the bridge over White river, near Indianapolis, supposed to have been asleep at the time, and was not discovered by the engineer until too late to stop the train; the verdict of the inquest exonerated the engineer from all blame. One of the employees of the company, in imprudently attempting to jump on the engine, when in motion, let his foot slip under the wheel, which was so injured as to cause amputation—these comprise all the casualities.

It will be noticed by the secretary's report, that on the 30th day of November, the capital stock and bonds of the company amounted to only $1,399,850, while the construction account os $1,615,765.22,

the difference having been paid out of the net earnings,
1440 which properly belonged to the stockholders, believing that the stock and bonds should represent the actual cost of the road, we thought it advisable to declare an extra dividend of twenty per cent., payable in stock (the fractions in cash); and a semi-annual dividend of seven per cent. in cash, all of which will be paid on the 6th day of January next. The excess of cost of road over the aggregate of stock and bonds, to be carried to profit and loss, so as to balance the account, and believing it unnecessary hereafter to increase our construction account, unless it should become necessary to lay down a double track, have ordered the construction account closed.

The large dividends we have been able to pay may be attributed more to the low cost of the road than the amount of business done upon it. The average cost of western roads is about thirty-two thousand dollars per mile. Had your road cost that amount, the net earnings for the last three years would not have exceeded eight per cent. per year on its cost.

In presenting our report to the stockholders at this time, it is gratifying to remark that the road is in good order, the entire line fenced, and is amply provided with motive power and working stock, and with all the necessary buildings, without a floating debt, and a handsome surplus on hand to meet any ordinary contingency which may occur. Our confidence in its future prosperity is undiminished.

By order of the board.

SAMUEL CRAWFORD, *President.*

1441 Q. Now, from the 12th annual report for 1860 I will call your attention to a statement there about the road-bed and the rolling stock.

A. 12th annual report, page 7.

Q. What is the language there on that subject?

A. "The roadbed and track are in perfect condition, and all the bridges safe and durable. The rolling stock and equipment has been maintained in excellent condition and at an economical cost of repairs, as will be seen by the report of the master machinist."

Q. Now, I will ask you, Mr. Duy, if you have prepared an exhibit showing a statement of expenditures,—statement number 65, statement of expenditures exclusive of operating expenses, interest and dividends from 1853 to 1872, and if you have prepared such a statement I wish you would hand to the reporter a typewritten copy thereof, which I will ask him to designate as Exhibit No. 50.

A. I have prepared such a statement and herewith produce a copy.

The typewritten copy, being Mr. Duy's statement No. 65, was marked by the reporter "Exhibit No. 50, October 6, 1899, Evans, Rep."

Mr. KETCHAM: Now on the last page of this list there are in-

cluded a large number of expenditures that the State is advised and believes are not properly chargeable to income, or cannot constitute the basis of a diminution of the amount to be recovered by the State; but inasmuch as we have gone into the ques-
1442–1454 tion of the receipts, we think it proper to go into these matters, not for the purpose of showing that they constitute proper charges against the State which the State denies, but for the purpose of showing the character of the charges that were made, in order that the master and the court may be advised of the disposition, to the extent as shown by the exhibit, of the earnings that this defendant road has received; the statement being an itemization, in part at least, of the transportation earnings, which items are included in other items, but also of amounts charged to profit and loss account, and thus indirectly to the surplus account, and in other instances to the surplus account directly; and with that statement we now offer Exhibit No. 50 in evidence.

Mr. Duy's statement No. 65, marked "Exhibit No. 50, October 6, 1899, Evans rep." was admitted in evidence the same being in the words and figures following, to-wit:

(See next page.)

1455 Q. Taking that statement I will get you to state what distributions appear to have been made by periods from '53 to '56, from '57 to '63, and from '64 to '71 on account of State, county and city taxes, distributed by the secretary, so far as he made the distribution, to other accounts than for operating expenses?

A. During the year 1853, charged to surplus account, $4,427.89.

Q. Haven't you the amounts for the three years, '53 to '56?

A. Yes.

Q. The State, county and city taxes from '53 to '56 what do they aggregate?

A. $14,964.43.

Q. Now then from the year '57 to '63 what was the aggregate of those taxes?

A. I haven't the aggregate.

Q. Give us by the years then the taxes from '57 to '63?

A. 1857..... $6,255.85.
1858..... 7,252.28.
1859..... 7,645.67.
1860..... 5,738.87.
1861..... 5,452.66.
1862..... 4,910.38.
1863..... 5,805.32.

Q. What do those sums aggregate, Mr. Duy?

A. $43,061.03.

Q. Now what were they from '64 to '71? Give them to us in detail if you hav-n't them otherwise.

A. 1864..... $6,917.10.
1865..... 26,602.65.
1866..... 7,435.75.
1867..... 18,439.33.

1456

1868..... 17,253.11.
1869..... 15,626.18.
1870..... 15,721.99.
1871..... 14,680.74.

Mr. WILLIAMS: Mr. Ketcham, will you permit me a question for my information?

Mr. KETCHAM: Yes.

(By Mr. WILLIAMS:)

Q. These amounts that you have given are State*m* county and city taxes only?

A. Yes sir.

(By Mr. KETCHAM:)

Q. What do they aggregate?

A. $122,876.85.

Q. Now what is the aggregate for the whole period to 1871?

A. $180,902.31.

Q. After the year 1871, whether there was any detail as to the taxes kept separate from anything else in your statement?

A. I think not.

Q. What were the United States internal revenue taxes from 1857 to 1863, of you have them in gross?

A. I can give that amount. I have the amount; it is not on that exhibit, but I have the amount.

Q. If you can get the amount of internal revenue taxes from '57 to '63, give it?

A. $12,596.49; and revenue stamps, $147.00.

Q. Making a total of what?

A. $12,743.49.

Q. Have you a statement of the internal revenue taxes from '63 to '71, or the items from which we can foot them up?

1457 A. The internal revenue taxes for that period as set out in detail in the exhibit amount to $150,075.23.

Q. You may state whether that was inclusive or exclusive of the taxes on dividends?

A. Exclusive. My recollection is that there is a small item of tax on dividends, $490.11 charged somewhere to surplus account. It is running in my mind——

Q. (Interrupting.) Is that included in this?

A. That I will have to look for; I suppose it is.

Q. I wish you would ascertain that if you can, so that we may have it accurately.

A. Mr. Cleland reminds me that that is charged first to stockholders' account, and then to surplus account.

Q. Mr. Duy, I will ask you if any portion, and if so what portion, of this aggregate of $162,818.72 of U. S. internal revenue taxes is

included in the items aggregating $81,358.15 shown on Exhibit 43 as being charged to transportation account?

A. The total amount,—the whole amount of $81,000—$81,358.15 as reported in Exhibit 43 as charged to transportation account is included in the aggregate given on this Exhibit No. 50.

Q. Now in what amount of miscellaneous expenditures did you find legal expenses, overcharges and donations?

A. Of legal expenses from 1857 to 1863 inclusive there appears on this Exhibit No. 50 $2,977.13.

Q. Do any portion of these appear on Exhibit 43?

Mr. WINTER: There are several items of legal expenses charged as additional expenditures on there. I suppose they are duplicated in this.

A. That item I have just given of legal expense is included in additional expenditures reported in Exhibit No. 43.

1458 Q. This Exhibit 50 is a statement of the disbursements other than those that on Exhibit 43 are described as operating expenses, and although charged on Exhibit 43 to transportation, if not included as an operating expense on Exhibit 43 those figures will be in Exhibit 50 a duplicate unless they are on Exhibit 43 specifically entered up to operating expenses?

A. Yes, in other words this statement is just what it purports to be, a statement of expenditures exclusive of operating expenses, interest and dividends. It covers everything else.

Q. Now what do you find there in the amount of overcharges?

A. Expenditures for overcharges from '57 to '63 as set out in Exhibit 50 amount to $3,116.86.

Q. Donations how much?

A. Donations, $897.60.

Q. Any more?

A. And from '64 to '71, $7,429.

Q. The total of these miscellaneous items is $14,420.59.

A. That is including legal expenses, overcharges and donations.

Q. Now I will call your attention to the item of rebuilding bridges, etc. What is the aggregate of that?

Mr. HAWKINS: They are not classified.

Q. You have no separate account there then of the item of rebuilding bridges?

A. No sir, it is not aggregated.

Q. Now, Mr. Duy, have you got an aggregation of all the expenditures from 1853 to 1871, inclusive?

A. '53 to '56 is the first aggregation.

1459 Q. Have you got an aggregate of all the expenditures exclusive of operating as shown upon Exhibit 43, and exclusive of interest and dividends as they appear upon this Exhibit 50 from the beginning up to November, 1863?

A. From the beginning up to November, '63, the expenditures exclusive of operating expenses, interest and dividends as set out in Exhibit 50 amount to $339,108.14.

Q. And from 1863 forward?

A. From 1863 to November 30, '71 inclusive the aggregate of such expenditures is $1,679,846.47.

Mr. KETCHAM: Will the court permit me to substitute a witness? This witness is suffering with a headache.
The MASTER: Certainly.
Mr. KETCHAM: Mr. Cleland, you may take the stand.

The witness Duy was temporarily excused and JOHN E. CLELAND, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Examination in chief.

Questions by W. A. KETCHAM, Esq.:

Q. Mr. Cleland, I will ask you if you were engaged with Mr. Duy and Mr. Fanning in going over these books and making exhibits?
A. I was.
Q. I will ask you if you have made an exhibit showing the detailed net earnings of the defendant company from the beginning to the 15th of January, 1873, taking the 15th day of January, 1873, as has been explained by Mr. Duy, upon the basis of one-eighth of the year 1873; if so will you produce it and hand to the reporter for identification as Exhibit No. 51?
1460–1464
A. I have prepared such a statement and produce the same herewith.

Mr. KETCHAM: I will ask the reporter to mark that exhibit.
The typewritten copy of Mr. Duy's statement No. 35 was marked by the reporter "Exhibit No. 51, Oct. 6, 1899, Evans, rep."
Mr. KETCHAM: I will offer that in evidence if the court please.
Mr. Duy's statement No. 35, marked "Exhibit No. 51, October 6, 1899, Evans, rep.," was admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

Mr. KETCHAM: That is detailed net earnings to January 15th, 1873.
1465–1469
Mr. WINTER: That is, from all sources.

Q. Now, I will ask if you prepared a statement of the account of foreign work and material sold by the defendant company, covering the period from the beginning to January 15th, 1873; and if you have, I will ask you to produce it and hand a typewritten copy thereof to the reporter for identification as Exhibit No. 52.
A. I have prepared such a statement and produce the same here with.

The typewritten copy of the statement, being Mr. Duy's statement No. 51, was marked by the reporter Exhibit No. 52, October 6, 1899, Evans, rep."

Mr. KETCHAM: I will now offer it in evidence.

Mr. Duy's statement No. 51, marked "Exhibit No. 52, October 6, 1899, Evans rep." was admitted in evidence the same being in the words and figures following, to-wit:

(See next page.)

1470 Q. Now Mr. Cleland I will call your attention to this Exhibit No. 52, account of foreign work and material sold. What was done, if there was anything done up to any period with reference to showing the profits in the machine shop account and crediting it to any other account and if, after that time there was any change in the method of keeping the account and the crediting of profits in that account was dispensed with until the defendant had accepted the general railroad law of the State, you may indicate by reference to the exhibit what that was, or what the fact was as shown by the books?

A. The difference between the credit side of the account and the debit side showed a profit which was carried to profit and loss account at the close of the year.

Q. Up to what time was that done?

A. Up to 1860 the amount of the profits were entered to profit and loss account, and two or three years after that, in different years. That was the custom up to '60.

Q. Did it run any later than '60?

A. In '64 profit and loss account was credited with $31.98; and in '62 profit and loss was credited from this account $606.53; and in 1867 profit and loss account was credited with $454.12. In all the years after that there are no credits to profit and loss account from this account.

Q. What was done November 30, '72?

A. November 30, '72 the whole balance of the account was credited to machine shop account.

Q. What was done with it in the machine shop account?

A. The machine shop account went into operating expenses.

1471–1479 Q. When was there any credit from the machine shop account; with reference to '72?

A. In this account?

Q. Yes.

A. Nothing.

Q. Now I will ask you of you prepared a schedule and lists showing the outside investments of this defendant company in loans, stocks and bonds?

A. We made such a statement.

Q. If you did, I will ask you to hand a typewritten copy thereof to the reporter to be identified as Exhibit No. 53.

A. I do so.

The typewritten copy of the statement, being Mr. Duy's statement No. 66 was marked by the reporter "Exhibit No. 53, October 6, 1899, Evans, rep."

Q. Will you state what the aggregate of those investments amounted to?

A. $2,095,052.48.

Mr. KETCHAM: I will offer that Exhibit No. 53, in evidence, if the court please.

Mr. Duy's statement No. 66, marked "Exhibit No. 53, Oct. 6, 1899, Evans, rep." was admitted in evidence, same being in the words and figures following, to-wit:

(See next page.)

1480 Mr. KETCHAM: Mr. Cleland, I wish at adjournment you would take this Exhibit No. 50 and prepare an exhibit showing in detail the aggregate amount entered there, to

First, rebuilding bridges.

Second, real estate and improvements.

Third, equipment.

Fourth, repairs, including in that real estate for gravel.

Fifth, telegraph lines; and

Sixth, branches and sidings.

I want to make that distribution, and then I will ask you about that after lunch, if you can make it up by that time.

The witness Duy having stated that his indisposition would not probably admit of his cross examination at the afternoon session, the hearing was adjourned until Monday, October 9, 1899, at 2 o'clock p. m.

1481 MONDAY, *October* 9, 1899—2.30 p. m.

The parties met pursuant to adjournment.

Absent: Hon. R. S. Taylor of counsel for plaintiff; otherwise counsel were present the same as on Friday. During the session Mr. Lawrence Maxwell, Jr., arrived and attended.

Stipulation.

It is admitted that at the time of the service of the demand for an accounting, which is Exhibit 1, the R. B. Thompson and the George E. Farrington, who accepted the service of the demand in behalf of the defendant company, were respectively the treasurer and the secretary of the defendant company; and that the president of the defendant company was Mr. James McCrea, and that he was not a resident of the State of Indiana at the time of the service of the demand.

The direct-examination of JOHN E. CLELAND was resumed as follows, by Mr. Ketcham:

Q. Now, Mr. Cleland, I will ask you to state whether since the adjournment you have made a recapitulation of certain expenditures exclusive of operating expenses, interest and dividends from 1853 to 1871 inclusive, as detailed in Exhibit No. 50?

A. I have made such recapitulation.

1482 Q. If you have, and have a typewritten copy thereof, I wish you would produce it and hand it to the reporter to be attached to and made a part of Exhibit No. 50.

A. I produce the same herewith.

Mr. KETCHAM: I now introduce that paper in evidence and ask that the same be marked and made a part of Exhibit No. 50.

The paper produced by the witness was admitted in evidence and marked by the reporter "Part of Exhibit No. 50, October 9, 1899, R. Evans, rep.," the same being in the words and figures following, to-wit:

(See next exhibit following.)

1483 Q. You may state to the court whether you are the Mr. Cleland who was referred to in the testimony of Mr. Duy who was engaged in the making out of the originals of these exhibits that have been introduced in evidence?

A. I am.

Q. And if these exhibits were carefully and truthfully made from the books as they were delivered to you for examination?

A. They were.

(Witness temporarily excused.)

GEORGE C. DUY was recalled, and his examination in chief was resumed as follows,

Questions by Mr. KETCHAM:

Q. I will ask if you have made a recapitulation of the stock account, as detailed in statement No. 39, (Exhibit 11), showing the actual amount of cash received by the defendant company upon the stocks, and bonds that afterwards went into stock, and that were used in the construction of the road of the defendant company? If you have prepared such a statement I will ask you to produce it and hand a typewritten copy to the reporter to be designated as Exhibit No. 54.

A. I have prepared a recapitulation of the whole of statement 39, Exhibit No. 11, which shows the items mentioned by you.

1484 The typewritten copy of Mr. Duy's statement, being Duy's statement No. 69, was marked by the reporter "Exhibit No. 54, October 9, 1899, Evans, rep."

Mr. KETCHAM: I will now offer that statement in evidence.

Mr. Duy's statement No. 69, marked "Exhibit No. 54, October 9, 1899, Evans, rep." was admitted in evidence, the same being in the words and figures following, to-wit:

(See next page.)

1485 (EXHIBIT No. 54.)

Recapitulation of "Stock Account," as Detailed in Statement No. 39, Exhibit 11.

1486 Recapitulation of "stock account," as detailed in statement No. 39, Exhibit No. 11, showing total stock issued and aggregate amount invested in same by stockholders.

Total stock issue			$1,988,150.00
Deduct:			
20% stock dividend of Nov. 1856		$211,600.00	
25% " " April 1864		376,700.00	
Stock issued to the company on bonds which had been paid		50,000.00	
Stock issued to the company on lost bonds		5,000.00	
Stock issued to John Rose for services August 1852		10 000.00	
Stock issued to C. Rose,—extra allowance April 1853.		6,000.00	
Stock issued on interest certificates for interest allowed on advanced payments		28,746.02	
Discount on stock sold—Ex. 11—	16,475.00		
" " " 13—	1,625.00		
		18,100.00	
Interest allowed John Rose on advanced payments, Jour. "A," p. 64		253.33	
Discount on $45,100 6% bonds surrendered for stock.		4,536.10	
Discount on $545,000 7% bonds surrendered for stock.		58,795.00	
			769,730.45
Balance			$1,218,419.55
1487 6% bonds issued	$75,400.00		
Sold at par (Eng. certf. & cash)	2,900.00		
Sold at discount	72,500.00		
Loss on same 10.058%	7,292.00		
Net proceeds on same	65,208.00		
Of bonds sold at discount, to wit		$72,500.00	
There were paid off at par		27,400.00	
And surrendered for stock		45,100.00	
On which the percentage of loss is		4,536.10	
Leaving invested in stock			40,563.90
Bonds sold at par as above			2,900.00
7% bonds issued	$600,000.00		
Disc't on same 10.79%	64,730.00		
	535,270.00		
Of the above $600,000 of bonds $50,000 were paid and $5,000 were lost—for which $55,000 stock was issued to the company, leaving surrendered for stock		$545,000.00	
On which the percentage of discount is		58,795.00	
Leaving invested in stock			486,205.00
Cash received for stock sold, as per Exhibit 11, p. 18.		542,120.76	
Less discount—See Exhibit 13, p. 4—note		1,625 00	
			540,495.76

1488	Vigo County bonds			$50,000.00
	Hadley for building depot			569.00
	Nelson for right of way			200.00
	Buchanan for right of way			50.00
	Fairbanks—Bal. on scales			350.00
	Engineer's certificates paid in stock			97,085.89
				$1,218,419.55
1847-48.	Issued for cash received			7,596.00
1849.	" "		$31,117.39	
	" engineer's certificates		20,872.61	
				51,990.00
1850.	" cash received		64,667.39	
	" engineer's certificates		23,169.73	
	" 6 % bonds		24,711.06	
	" Vigo Co. bonds		50,000.00	
	" 6 % bonds sold at par		2,900.00	
				165,448.18
1851.	" cash received		104,418.93	
	" engineer's certificates		38,936.97	
	" 6 % bonds		14,259.78	
	" 7 % "		200,078.00	
				357,692.68
1852.	" cash received		210,421.74	
	" engineer's certificates		13,285.75	
	" 6 % bonds		1,695.06	
	" 7 % bonds		286,125.00	
	" Hadley building depot		569.00	
	" Nelson right of way		200.00	
				512,196.55
1489				
1853.	Issued for cash received		$62,770.31	
	" engineer's certificates		821.83	
	" Buchanan right of way		50.00	
				$63,642.14
1854.	" cash received			40,104.00
1855.	" "		16,350.00	
	" Fairbanks on scales		350.00	
				16,700.00
1856.	" cash received			3,050.00
				$1,218,419.55

1490 Q. Referring to that exhibit, it shows also, does it not, or what does it show with reference to, the amount of stock and bonds, if there were any, that were taken by the contractors in lieu of so much cash in connection with the building of the road?

A. It shows the stock that was issued for engineer's certificates; stock that was issued by Vigo County bonds subscription; stock that was issued for rights of way; balance on scales; and for building a depot.

Q. You may state whether that exhibit shows precisely and correctly where it can be precisely ascertained from the books, and where it cannot be ascertained from the books, if in any other manner, and if so in what manner,—the net cash that was paid in to the company by stockholders, or by those who purchased bonds that were subsequently taken in stock, and where stock or bonds the proceeds of which went, or the stock or bonds themselves went, directly

to the construction of the road at par,—whether it shows them as they were taken at par?

A. Yes sir.

Q. What was the aggregate amount, then, of the total cash represented by the stock that was issued other than the two stock dividends about which you have already testified, that went from the stockholders either directly or indirectly, or through the intervention of bon-s that were subsequently surrendered for stock in the construction of the road?

A. Do you just want the cash money, or do you want the whole amount?

Q. The whole amount that went into the construction of the road through the stock and bonds that were sold to the stock-
1491 holders, or the bonds that were subsequently turned into stock and went into the construction of the road?

A. And leaving out these little items?

Q. No sir, including the items in right of way, scales, and depots, and everything that entered into the construction of the road?

A. One million, two hundred and eighteen thousand, four hundred and nineteen dollars and fifty five cents, ($1,218,419.55).

Cross examination.

Questions by JOHN G. WILLIAMS, Esq.:

Q. Mr. Duy, will you please get Ledger A and turn to the first page of the construction account?

A. Yes sir.

Q. What is the amount shown by that ledger to have been spent on construction up to the year ending December 31, 1849?

A. $77,002.61.

Q. What is the amount shown to have been expended for construction during the following year—the year 1850?

A. $119,025.92.

Q. Now does that last item agree with your statement of construction for that year?

A. It does not agree, at those dates.

Q. What is the difference?

A. The difference is $4,644.48.

Q. Which way?

A. My statement is the most.

Q. You are mistaken.

A. No, the ledger account is the most.

1492 Q. Well, the difference is forty-seven hundred and something, isn't it, instead of forty-six hundred and something?

A. $4,644.46 I make it.

Q. That is what you make it, is it? You make the difference then what?

A. $4,644.48.

Q. You give it that much less than the ledger shows?

A. As the ledger is footed within those dates.

Q. Now can you explain that difference,—why you made it less?
A. Yes sir, I think so.
Q. Please do so, then.
A. The last two items on the ledger posted in that year are, $3,104.09, and $1,540.39, aggregating $4,644.48, which is the difference between my statement and the ledger. On my statement those two accounts appear in 1851.
Q. Why did you put them in 1851?
A. Because the journal says so, I think.
Q. Well, look and see.
A. January 3rd; at the top of the journal page is Terre Haute, Indiana, 1850. That is the first entry. The next entry is January 3rd.
Q. 1850?
A. It doesn't say. It follows after the date 1850.

(By Mr. KETCHAM:)

Q. What page of the journal *it* that, Mr. Duy?
A. 48.

(By Mr. WILLIAMS:)

Q. Under what date does it appear posted in the ledger?
1493 A. No date. There are eleven entries in the ledger of December without any date.
Q. Well, it is made in the month of December?
A. Yes sir.
Q. Posted as of December in the ledger?
A. Yes sir.
Q. What amount does the ledger show charged to construction in the year 1851?
A. The amounts less credits, if I have made no mistake in this hasty calculation is $226,734.24—I make that last sum $126,734.24.
Q. Does that agree with your statement of the amount charged that year?
A. No sir, it does not.
Q. What is the difference, and which way is it?
A. I make it $2,624.94.
Q. Difference?
A. Yes sir.
Q. Which way is that difference?
A. My statement is the most.
Q. Now, will you please explain that difference?
A. It may take some time.
Q. Well then, before going to that, I will call your attention to another matter connected with it. What do you make the aggregate of the two years, 1850 and 1851 from your statement?
A. $243,740.62.
Q. Now, what is the aggregate on the ledger for those two years?
A. I make it $245,760.16; our aggregate is $243,740.62. The

difference is $2,019.54, if I have made no mistake in these
1494 hasty calculations. This book is divided up into two or three periods each year and it isn't very easy to get it.

Mr. WILLIAMS: I think it will expedite matters if we go on through this, and then he can take time to explain these discrepancies, and look them up afterwards.

The WITNESS: I was going to say it will take a good time to explain the discrepancies; they come together after awhile, where my statements and the secretary's books agree, but my recollection is it is several years,—away down to 1854.

Mr. WILLIAMS: After we adjourn you can take and look the matter up and explain where these discrepancies are.

The WITNESS: You will want the difference each year between the ledger and the statement, and in what it consists?

Mr. WILLIAMS: Yes.

Q. What is the statement of construction on the ledger for the year 1852? What does that aggregate?

Mr. WINTER: Do you want the net, deducting credits?

Mr. WILLIAMS: Either way. I would rather have them separate so that I can check them with my figures.

The WITNESS: I will have to take time to do it because these accounts are cut up into two or three periods in the year and it takes a good deal of figuring.

Mr. WILLIAMS: What is the trouble with giving me the footing of the ledger?

1495 The WITNESS: It is divided into three or four, and sometimes five periods; the balances are carried down, and the footing of the ledger will not give it.

Mr WILLIAMS: By paying proper regard to those balances, it will, won't it?

The WITNESS: Yes, why of course it will, when you get them all.

A. $746,006.30 That is the debit side of the ledger for that year with no credits taken off.

Q. Were there any credits that year?

A. Oh yes.

Q. What was the amount of that credit?

A. The credits that are $19,012.48.

Q. Leaving a net balance of what, to the debit?

A. $726,993.82.

Q. Does that agree with the statement prepared by you?

A. Our statement is $990,929.36.

Q. Mr. Duy, you have a consolidated statement of that construction account, haven't you?

A. Yes sir, but the consolidated statement shows the net; if that is what you want the comparison on I will have to get the net from the ledger. I can make a complete statement, if you want it.

Q. In making that consolidated statement you divided the year 1852 into two periods of six months each didn't you?

A. Yes sir.

Q. Why did you do that?

1496 A. The reason that we did that was because in talking about the way that the ultimate calculation should be made, figuring interest, we thought we might divide the matter into semi-annual periods instead of annually. I would have to do so.

Q. You didn't do any other year that way?

A. I don't think so; no sir. We gave that up as not practicable.

Q. Can you tell me readily the reason for the difference between the ledger and your statement?

A. No sir, I cannot.

Q. Then we will not waste any time on it now. Can you give me easily the amount charged on the ledger on construction account for the year 1853?

A. The amount charged in 1853 to construction account on the ledger is $374,282.17.

Q. Were there any credits?

A. Yes sir; $28,794.72.

Q. And what was the net balance on the debit side that year?

A. The net charge is $345,487.45.

Q. Does that agree with your statement of the amount for that year?

A. $102,611.81

Q. The question is, does it agree?

A. No, sir.

Q. What is the difference, and in what way?

A. $102,611.81. The difference is $242,875.64, apparently.

Q. That is your statement is more than two hundred thousand dollars less than the account on the ledger?

A. Yes sir.

1497 Q. Now take the year 1854, please, Mr. Duy, and give me a statement of the aggregate charge on the construction account that year?

A. $25,618.68.

Q. Any credits?

A. Yes sir.

Q. Give them please.

A. $222.05.

Q. Leaving a net balance of what, for that year?

A. $25,396.63.

Q. Does that agree with your statement of the construction account for that year?

A. Yes sir.

Q. Take the year 1855, please, and give me the amount charged on construction account for that year?

A. $36,844.78.

Q. Were there any credits?

A. No sir.

Q. Then it is thirty-six, is it? Don't you think it is thirty-eight? 36 is right, is it?
A. $36,844.78.
Q. And no credits?
A. And no credits in 1855.
Q. Does that agree with your statement?
A. Yes sir.
Q. Now take the year 1856, please, and give me the amount charged there that year to construction on the ledger?
A. Down to—?
Q. November 30th would be the last, wouldn't it?
A. $152,356.43.
Q. Any credits?
A. Credit, $4,315.22.
1498 Q. That wasn't made as of that year, was it?
A. That is credited November 30, 1856.
Q. Is it?
A. It is so posted.
Q. Net balance is what?
A. $148,041.21.
Q. Does that agree with your statement?
A. Yes sir, except in my statement that credit is taken off of the aggregate for the whole time up to that period.
Q. The net balance, though, agrees with yours for that year?
A. Yes sir.
Q. That credit, Mr. Duy, was the item charged there to equalize the construction account with the stock and bond account, wasn't it?
A. Yes sir, and charged to profit and loss account.
Q. Now Mr. Duy, this ledger account from which you have been giving me the credits is made up in large part, is it not, of transfers from other accounts?
A. Yes sir.
Q. Equipment, for instance, was kept in a separate account, and at different periods transferred to this construction account?
A. Yes sir, at the end of each year.
Q. Real estate the same way?
A. The same way.
Q. And your consolidated statement which you furnished us here shows the different accounts from which amounts were transferred to construction account—Exhibit No. 10?
1499 A. Yes sir, the consolidation shows it and the annual statements show it.
Q. Well, the paper you hold in your hand is not the statement I have reference to; I mean the long statement which was made Exhibit No. 10.
A. They both show the same thing in different form.
Q. Have you them?
A. Yes sir.
Q. (Exhibit 10 placed in hands of witness.) Now that consolidated statement which you hold in your hand Exhibit 10, shows

the various accounts from which these transfers were made to construction, don't they?

A. Yes.

Q. And these transfers you say were generally made at the end of the year?

A At the end of the year; at the end of the fiscal year.

Q. Now was there any way in your going over the books by which you could ascertain the exact date at which these expenditures were made, regardless of the time they were charged to construction?

A. Yes sir.

Q. How could you ascertain that?

A. In these outside individual accounts that were transferred.

Q. They had the dates?

A. They had the dates.

Q. At which the charges were made?

A. Yes sir.

Q. And did the journal help you any in that respect?

A. The journal gives all the items.

Q. At specific dates?

1500 A. Well yes, I may say so. Along the first part of it the dates are very irregular, and sometimes omitted entirely.

Q. They are irregular along the first part?

A. Yes sir.

Q. Now those differences between your statements and the footings of this ledger as you have given them to us, are due, in the main, to what?

A. One of those differences, the $2019, and some cents, is made up by two credits in that year, excepting the difference of one cent which comes out afterwards. That large discrepancy I cannot account for just now, but at the end of 1856 our statements and the ledger agree excepting ten cents, I think, mistake in the ledger addition.

Q. I notice that the aggregate is the same, but that the distribution varies materially from the ledger.

A. Yes sir.

Q. Now can you by the next time we meet look into that for us?

A. If you don't meet tomorrow I can do so certainly.

Q. Your statements agree with the ledger as to 1849, 1854, 1855 and 1856 as I understand you, so that it leaves you the years 1850, 1851, 1852 and 1853 to be examined?

A. Yes sir. There is one of those years where the difference is $2,000 and something; I have explained that by giving you the original credits on the ledger without the debits, and I think probably——

Q. (Interrupting.) The great bulk of the charges to construction account were made in the years 1452 and 1853, were they not?

A. Yes sir, I think so.

1501 Q. What I want you to get for me, if you can, is the proper years within which these amounts should be actually charged;

the distribution, in other words of those two years 1852 and 1853 as to time of expenditure—the ledger not showing definitely itself.

A. Yes sir, I understand.

Q. Mr. Duy, did you examine the construction account after 1856?

A. Yes sir.

Q. Did you make any statements of it after that year?

A. Yes sir; there is only one item, I think, charged to construction account after that year.

A. After 1856?

A. Yes sir.

Q. Wasn't there a large amount charged on 1869?

A. Not to construction account.

Q. Wasn't there a charge in 1870?

A. Not to construction account, no sir.

Q. And in 1871 and 1872?

A. Not in 1871; in 1872 my recollection is there is an account opened called construction and equipment account, the items in which are stated to be for—I don't know where the statement is—in the secretary's statements somewhere—they are stated to be for betterments, equipments and construction expended during the year 1872, $207,000 and something.

Q. You are speaking from memory?

A. Yes sir, I am not giving the accurate amount.

Q. Don't you find charges on the books from 1869 to the close of 1872 aggregating nearly $600,000 that were for construction, equipment and real estate?

1502 A. There is nothing charged on the books to the construction account. In 1869, 1870 and 1871 I think there is an account extension to State line I believe is the title; and there is an account double track, and perhaps equipment account.

Q. Weren't there items also charged to real estate during those years?

A. I should have to look at that.

Q. Did you make the statements of those years similar to the statements you made for the other years?

A. Yes sir, I did.

Q. Did you make a consolidated statement for those years like you did up to 1856, for instance?

A. No, I think not.

Q. You made itemized statements for each year, did you?

A. Yes sir.

Q. Well, would you look at them please and tell me the accounts on the ledger embraced within those statements.

A. Construction of double track; equipment account; T. H. & I. R. R. extension; I think that is all that appears; I don't remember,—I don't think there were any others.

Q. For what year is that statement you hold in your hand?

A. This begins in May, 1869, 1870 and 1871.

Q. Does that give the aggregate of all of the items you have named for each year?

A. Double track it gives a credit in 1869 and for 1870; that is all there was in there. Equipment account gives—I can give it in a moment—it gives 1870 and 1871 together.

Q. Well does it give 1872 for equipment?

A. There wasn't anything in 1872 in this account; that is the construction and equipment account that I spoke of awhile
1503 ago. I can give the amount of that, though; it is carried into another account with all these.

Q. With all of those?

A. Yes sir.

Q. What other account were they carried into?

A. They were carried into the account entitled "Railroad, cost of." The T. H. & I. R. R. Extension account is in this statement by years, and that account, the double track, and the equipment, and the construction & equipment, and the original construction account are all carried into "Railroad, cost of."

Q. And in what ledger will that account be found?

A. That is on Ledger D page 5.

Q. Take the account of railroad double track; how much is charged to that account?

Mr. KETCHAM: We object to that, may the court please; in the first place it is not cross-examination of the witness, and in the next place it appears that these charges should not be made within fifteen years from the commencement of the work, and they constitute no proper charge against the State—no proper item of debit against the amount that the State is suing for in this action, and can constitute no credit to the railroad company on account of any of the transactions here.

The master overruled the objection and admitted the evidence subject to consideration of the grounds of objection at the time of the final hearing.

1504 Adjourned to Wednesday, October 11, 1899, at ten o'clock a. m.

1505 INDIANAPOLIS, *October* 11, 1899—ten o'clock a. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, except Mr. Hawkins and Mr. Taylor, on the part of plaintiff's counsel, and Messrs. Pickens and Maxwell, on the part of the defence.

The cross-examination of the witness, GEORGE C. DUY, was resumed as follows:

By Mr. WILLIAMS:

Q. Mr. Duy, at the last adjournment I had asked you to give me the amount charged to the account known as double track and that you did not answer at that time. I would like to make that more specific, so as to get it by years. What was the amount charged in 1869 to double track?

A. $17,884.41.
Q. In 1870?
A. In 1870 the amount is $7,190.94.
Q. In 1871?
A. There is nothing.
Q. In 1872?
A. Nothing. The total is $25,075.35.
Q. Now, will you take the equipment account, please, and give us the amount to that account for the year 1869 first.

1506 A. Nothing in 1869, nothing to the equipment account.
Q. Nothing in 1869 to the equipment. In 1870?
A. $141,977.53.
Q. In 1871?
A. $37,042.92.
Q. In 1872?
A. Nothing in this account.
Q. Nothing in that account?
A. No sir.
Q. Which is the one you call the equipment account?
A. The equipment account, yes sir. There are credits both in 1870 and 1871.
Q. Give them to me, please.
A. In this account?
Q. What are the credits?
A. The credit in 1870, $3,837.70; in 1871, $37,042.92, being the same amount as is charged in that year. Total debits, $179,020.45. Total credits, $40,880.62; net balance, $138,139.83.
Q. Now, when you take the extension account, the State line extension or the T. H. & I. Railroad extension, as you call it indiscriminately——
A. That is the way it is opened on that ledger.
Q. How?
A. T. H. & I. R. R. extension.
Q. Give the amount to that account for 1869.
A. The ledger shows posted in 1869, $207,406.86, and my statement is made the same way. There is a charge on Journal D page 381, of December 31, $603.25, which is posted in the next year and appears on my statement the same way.

1507 Q. So that the true amount then from the books is what you give, $207,406.86.
A. As appears on that year on the ledger. The other ought probably to be in August. It is on the journal December 31st.
Q. Now, in 1870 what was shown charged to that account?
A. $240,500.55. There is a credit there of $140.98; balance $240,359.57, or a net debit of $240,359.57.
Q. Now the year 1871?
A. $2,094.28.
Q. Any credit?
A. No sir.

Q. That is the net amount that year?
A. Yes sir. There is a credit in 1872 of $1000.

By Mr. HAWKINS:

Q. Any debit in 1872?
A. No sir.

By Mr. WILLIAMS:

Q. I haven't got to 1872 yet. There is no credit in 1871. Is that right?
A. That appears to be right, yes sir.
Q. Now take 1872, please.
A. There is nothing charged in this account in 1872.
Q. If I remember you said that there was a new account opened that year entitled "Construction and equipment."
A. Yes sir.
Q. Have you that account there?
1508 A. Yes sir.
Q. What was charged them to construction and equipment?

Mr. KETCHAM: Do you want him to leave out the credit of a thousand dollars in 1872?

Q. That is right. You say there was a credit in 1872 to this account. For what amount was that credit?
A. $1,000.
Q. And that left a net debit to this account of the T. H. & I. R. R. extension for the year 1871 of $1,094.28?
A. Yes sir.

Mr. WILLIAMS: I am much obliged to you Mr. Ketcham; I did not want to pass that.
Mr. KETCHAM: Now, hadn't you better get the total of that account?
Mr. WILLIAMS: I will.

Q. Will you give me the total amount for the three years, 1869, 1870, and 1871, the net amount, I mean, to the debit of the T. H. & I. R. R. Extension account.
A. Less credits?
Q. Yes sir.
A. For the whole period, less this thousand dollars, the credit is $448,860.71. The total amount charged is $448,860.71. I want to say here, Mr. Williams, that you asked me the other day if there was any real estate in this matter, and I answered from memory that I thought there was not. By reference to this account I see a charge of real estate $500 charged directly to extension.
1509 Q. I will get to the real estate directly.
A. I may not come to that again.
Q. Now, how much was charged to construction and equipmen account in 1872?

A. In 1871 there is charged $5,761.75; in 1872 there was charged $240,428.17.

Q. Are there any credits to that account?

A. Credits in 1872, $15,064.36.

Q. What is the net debit to that account in 1872?

A. Debit $231,125.56.

Q. Have you the real estate account for 1869?

A. Yes sir, I think so. The whole of that two hundred and forty-six thousand dollars is not charged to the cost of the road.

Q. I will get to that presently.

A. In what year did you ask me?

Q. Wasn't there any amount transferred in 1869 from real estate to the State line extension?

A. Yes sir, I omitted that.

Q. How much did it amount to?

A. $3,050.

Q. Now was there not an amount similarly transferred in 1870, $10,665.

A. I don't think any such amount was transferred. I will find it in a moment. (Referring.) There is an item of that amount from right of way, $10,165.

Q. Then there is another $500.

A. $500 from real estate. That first item is charged directly to right of way and then transferred.

Q. $10,165. to right of way and $500. to real estate?

A. Yes sir.

Q. Making the aggregate of the two charges $10,665.

1510 A. Yes sir.

Q. Now look in 1872 please, and see if you cannot find a transfer of real estate there amounting to $4,490.50?

A. I do not find any such amount any where.

Q. Then we will pass on. When was the construction and equipment account opened?

A. I beg pardon, that $4,490.50 is charged to construction and equipment account.

Q. Now, then, again, please, when was that construction and equipment account opened?

A. June 30, 1869. The construction and equipment account opened on December 31, 1871.

Q. Now, with what was it opened, an original charge or a transfer?

A. It is opened with a charge to accounts payable, $2,708.27.

Q. Do you know what that was?

A. I don't know what that was. I conclude that that was a summary of various accounts which had been paid by the treasurer and reported in bulk to the secretary. We haven't got the items of those things.

Q. They do not appear on the journal?

A. They do not appear. It is just an entry of—just sundries debtor to accounts payable, and then there are various accounts

charged with the money paid out, the whole amount is for expenses during the month of December, 1871, $2,708.27.

Q. Have you a schedule showing this double track account with a typewritten copy of it?

A. I made one, yes sir.

Q. You have one, you say?

A. I have it in my hand; yes sir.

Q. Does it include anything to double track, that statement?

1511 A. No sir, that is, a sheet of this, one sheet of this paper that I held in my hand has the double track on it alone.

Q. What is contained in the balance of the schedule?

A. The balance of the schedule contains a statement of the construction of double track, the equipment account, T. H. & I. R. R. Extension, and railroad, cost of, account and appended is a statement, an exhibit of construction and equipment account.

Q. Will you furnish that to the reporter and have him mark it as an exhibit?

A. If I have any right to I will. I made it in the employment of the State and handed it over to the State's counsel.

Mr. KETCHAM: I understand, may it please the master, that this presents the same question that we objected to the other day, and without reiterating the objections every time, I understand that all this examination goes in over our objection, that it is not cross-examination and not a proper matter of defense, in short, under the objection heretofore stated.

The MASTER: Let it go in, subject to objections.

Mr. WILLIAMS: May the master please, I will offer this statement, it being expert Schedule No. 59, in evidence.

1512–1525 The master overruled plaintiff's objection, heretofore stated and admitted the evidence subject to consideration of the grounds of objection at the time of the final hearing.

The said expert Schedule No. 59 was admitted in evidence and marked by the reporter "Exhibit No. 55, October 11, 1899, W. S. G.;" the same being in the words and figures following, to-wit:

(See next page.)

1526 Q. Does that schedule which has just been made No. 55 show these three real estate items about which I have already asked you?

Mr. KETCHAM: You asked him about four, didn't you, Mr. Williams?

Mr. WILLIAMS: There were four in detail, but three in the aggregate.

The WITNESS: They are all in this statement.

Mr. KETCHAM: They are included in the aggregates that you have given?

The WITNESS: Yes sir.

Q. At our last session, I called your attention to the discrepancies existing between the statement of annual expenditures for construction as made by you and the footings of the ledger as they appeared for those same periods, respectively, and suggested that the journal entries would show the dates when the expenditures were made, rather than the transfer of the various accounts to the ledger under the head of construction; and you kindly offered to examine into the years that I named, several of them, to ascertain if those differences could be explained. Instead of going directly to those years that I mentioned I would like to start from the beginning, and I think we can do it readily, in as much as the years that precede those I called your attention to are not extensive or intricate.

A. I have it made out from the beginning.

Q. In your statement you show no expenditures at all. I
1527 refer now to Exhibit 10, which is your consolidated statement of the construction account—if you will get that please, and have it before you, it will be better, I guess—now, in that summary in the shape of Exhibit No. 10, you have shown nothing there expended in 1847, have you?

A. Not in this summary, no sir.

Q. Was there not some money spent in 1847?

A. Nothing charged to construction account.

Q. Yes sir; look on page 8 of that Exhibit No. 3.

A. Yes sir, there was money spent in 1847 for surveying and engineering.

Q. How much? There are three items there, if that will aid you any.

A. I think there are two carried out.

Q. Three; $1,702.02, $1,798.37, and $308.90.

A. Those two last items are marked here December, 1848.

Q. What, the $308.90?

A. Yes sir, the $308.90.

Q. They are charged on page 2 of the journal of 1847, as shown by your statement. They precede the year 1848. Well, leave out the 308. What was the balance outside of that, that was spent in 1847?

A. $3,500.39.

Q. Now, the journal entry shows, and your statement shows, that those amounts were paid in the year 1847, don't they?

A. Yes sir.

Q. Now, your Exhibit No. 10 does not show any expenditures made in 1848, were not expenditures made in that year as shown by your itemized statement of construction.

1528 A. Yes sir.

Q. How much? You will find that on pages——

A. It is on here.

Q. Pages 8, 12, and 23?

A. $1,436.55.

By Mr. KETCHAM: Does that include the $308.90?

A. Yes sir. No, it does not.

By Mr. WILLIAMS:

Q. Yes, it does, Mr. Duy; it is bound to.
A. Oh, in 1848. Yes, yes. I was thinking of 1847.
Q. Now, in your Exhibit 10, you show the expenditures made for the year 1849, as $77,002.61, don't you?
A. Yes sir.
Q. Have you examined the thing carefully enough to say now that there were not other items included and paid out in 1849, in addition to that amount?
A. For construction?
Q. Yes sir.
A. I don't think there were.
Q. Now, please turn to your itemized statement of construction. Turn to page 1 of your Exhibit No. 3, itemized construction. What amount is charged there under date of May 4th, 1849?
A. $14,950, $5,812.
Q. Now, under date of June 6th, 1849, what is charged?
A. $21,350.
Q. Under date of July 14th, on the same page, what is charged?
1529 A. $9,212. That is paid in stock.
Q. Under date of October 11th, on page 1?
A. $17,359.36.
Q. Now, the same date, another item.
A. $8,319.25.
Q. Now, do you know what those two amount to?
A. $77,002.61.
Q. And that is what you have charged on your Exhibit No. 10?
A. And No. 49, yes sir.
Q. Now, please turn to page 8, in that Exhibit 3, which you hold in your hand.
A. Yes sir.
Q. Does not there appear there an item paid in August, 1849, for surveying and engineering?
A. Yes sir.
Q. How much?
A. $2,392.71.
Q. Now, another item, under the same date, on the same page, $587.69.
A. Yes, that may be all for surveying, I don't know, $587.69.

By Mr. KETCHAM:

Q. Now, the next item you call attention to is what?
A. $578.19.

By Mr. WILLIAMS:

Q. Those two last items appear to have been paid out in August, 1849, don't they?

1530 A. Yes sir.

Q. Now, turn to page 11 of that same statement, page 11 of Exhibit No. 3, don't you find a charge there under date of August 28th, office furniture, and so forth?

A. Yes sir, $149.90.

Q. Now, turn to page 13, of that same Exhibit 3, and see if you do not find an item paid there under date of October 26, 1849, $95?

A. There is no date on it here.

Q. The date is in the text.

A. Yes, October 26, 1849, $95.

Q. Now, turn to page 20 of that exhibit, and see if you don't find two items there that were paid in August, 1849.

A. $141,299.48.

Q. Now, turn to page 23 of that exhibit and see if you do not find two items there paid in August, 1849?

A. Yes sir, $1,938.97, and 875.98.

Q. Now, none of these items that I have asked you about since you gave the total of the first set of items I gave you as $77,002.61, none of these last items are included in that, are they?

A. Please give me those pages again that you refer to.

Q. Two of them is on page 8.

A. That does not appear in my construction account until 1852; that is the time it is charged over on the book.

Q. But the time it was paid out was in 1849?

A. Yes sir.

Q. Now, page 11?

A. That is the same way.

1531 Q. Paid in 1849, but not charged in your account until 1852?

A. Nor charged on the books.

Q. Yes, it was charged on the books.

A. I mean to construction account.

Q. Now, page 13?

A. That is the same way.

Q. Two items on page 20?

A. That is the same.

Q. Two items on page 23.

A. Those are the same.

Q. Now, please turn tp page 20, of that exhibit, and give us the credit items under date of December 17th, 1849?

A. $30.35.

Q. There is another one, $5.24.

A. That is August 10th.

By Mr. HAWKINS:

Q. Is that the 10th or the journal page?

A. That is August 10th.

By Mr. WILLIAMS:

Q. August is $5.24 and December is $30.35?

A. Yes sir.
Q. Making a total credit of $35.59?
A. Yes sir.

Q. Would you run up those items that I have given you, exclusive of the amount that you show on your Exhibit No. 10, for 1849, and see how much they make?

1532

A. $6,480.73.
Q. The net amount of the charges shown for the year?
A. I have not taken off the credit, $35.59; deducting that, it makes, net, $6,445.14.
Q. Now, will you please add that to the amount shown on your Exhibit No. 10 for that year and give us the aggregate?
A. $83,447.75.
Q. Now, that amount, $83,447.75, is the amount of expenditures made during the year 1849, as shown by the books, and charged to construction account?

Mr. KETCHAM: He has not said so; on the contrary he has said the very reverse of that.

A. It is the amount of expenditure made during the year 1849; it is not charged to construction that year.
Q. I did not say in that year.
A. Your question might leave one to think so.
Q. I did not intend it so. I will make it plainer. This extra amount of six thousand and odd dollars, you have in another place in your statement, namely, in the year 1852, haven't you?
A. Yes sir.
Q. You put them, in 1852, regardless of the fact that the journal showed they were paid in 1849?
A. Yes sir; because I made a transcript of the construction account, and put these in as exhibits attached, to show when they were paid.

Q. Now, we have reached the exact facts about when they were paid, so far as these items were concerned.

1533

A. Yes sir.
Q. Now, will you please turn to Exhibit No. 4, being itemized construction account for the last six months in 1852, and turn to page 2 of that exhibit and see if you don't find there an amount paid out in 1849 for construction.
A. There is an item there charged to construction account in October, 1852, for engineers' services, August 28, 1849.
Q. Read the balance of it, please.
A. "For cash payments on same, est."—estimates, I suppose it means,—"see folio 35, on sections 33, 34, and 35, $1,766.27."
Q. Now, does not that state on the face of your exhibit that that item was omitted August 28, 1849?
A. Yes sir, I so read it, or intended to.
Q. Now, will you please add that to the other amount you had just now, and give us the total?
A. $85,214.

Q. And two cents, we have it.
A. And two cents it should be, $85,214.02.
Q. Then, on the figures you have had, that last item you have just given, represents the expenditures made in the year 1849, and charged ultimately to construction account?
A. Yes sir.

Mr. WILLIAMS: I wish to state here to the master, and to the counsel on the other side, so that there will be no misunderstanding about it, if in asking questions hurriedly I might omit some-
1534 thing, I do not claim for a moment that any of these items about which I am inquiring now, or similar ones afterwards brought into these accounts and showing in subsequent years, my purpose now is to locate them in their proper years, when these expenditures were made, to locate the expenditures as of their proper years. The witness has stated heretofore, and we all understand that, that a large number of items appear in construction account itself on the ledger, are made up of items transferred from other accounts, that had been kept in other parts of the book, and those transfers were not made until say 1852, but the original items constituting those original amounts did accrue prior to the date of the transfer; and I wish to assure the gentlemen and the master that it is far from my purpose to confuse anything; I want to do this intelligently, and will be very thankful for any aid to that end; I want to get it right.
The MASTER: I had understood that to be the purpose of the inquiry.

Q. Now, Mr. Duy, on your Exhibit 10, showing construction account for the year 1850, what amount do you get?
A. $114,381.44.
Q. Now, the items going to make up that aggregate appear on pages 1 and 2 of Exhibit 3, do they not, Exhibit 3 being your itemized construction account from the beginning to June 30, 1852?
A. Pages 1 and 2, yes sir.
1535 Q. Now, will you please to turn to page 8, of that Exhibit No. 3, and see if there was not an amount paid out in June, 1850, for surveying and engineering, and if so, give us the amount of it.
A. Two items, $2,253.38.
Q. Now, another item in September, on the same page.
A. $100 and $1,047.04 in December.
Q. What do those make in the aggregate?
A. $3,442.
Q. Now, turn to page 12 of that Exhibit No. 3, please, and give me the amounts, if any, that were paid out in April and September and December, 1850, for relinquishment of rights of way.
A. April, $157.43; September, $300; December, $236.50
Q. Now, turn to page 13, and see if there was not an item for discount paid out in that year, 1850?
A. Yes sir.

Q. What is the amount of it, please?
A. Do you want them separated?
Q. Give me the aggregate, please.
A. $7,628.
Q. Turn to page 20 of that same exhibit and see if you find any item of interest paid during that year 1850, and if so give us the amount of it.
A. $1,917.87.
Q. Should there not be $10 added to that for the error there, that is palpable on the face of it?
A. Yes sir.
Q. So that the amount is—
A. $1,927.87.
Q. Just tell us what that error was.

1536 A. I explained in my examination in chief that there were a few minor errors in the book-keeping and that we followed the books without attempting to correct them.

Q. The exhibit is correct, that is, the footing is not corrected, but the error is noted on the face of your exhibit?
A. Yes sir.
Q. Now, turn to page 23, please, and if you find any amount there charged in contingent account during the year 1850, please give it to me.
A. $644.85.
Q. June, 1850, was it not?
A. June, 1850.
Q. Now, turn to page 24 of that Exhibit No. 3, please.

Mr. KETCHAM: Is there not some below that, in July, still?
The WITNESS: That is carried over to the next page.

Q. Now, on page 24, if you find any amounts there paid in 1850, please give me the amount.
A. $3,237.42.
Q. $3,223.42, I have got it.
A. I will have to stick to me figures, $3,237.42. There is a $14 item here which I expect you omitted.
Q. It is put 1851 here, journal 48.
A. I expect the typewriter has got that wrong.
Q. It ought to go in then, in 1850?
A. I think so.

1537 Q. All right; the item is $3,237.42, then. Now, turn back to page 20, of that exhibit and see if you do not find a credit there that should go on this amount expended in 1850, a credit to interest account during that year.

A. In 1850 there is a credit of $305.17, right in the middle of the page, made up of five items.
Q. Now, please give me the aggregate of these items that we have been establishing here, or telling about, and after deducting the $305.17, give me the net amount to be added to what you have charged on your Exhibit 10.

A. Let me call the items.
Q. Yes sir.
A. $3,400.42, $693.93, $7,628, $644.85, $3,237.42.
Q. But you left out $1,927.87.
A. I make that $17,532.49.
Q. You have not yet deducted the credit, have you?
A. No sir.
Q. Please state me the amount, what you have found, exclusive of the credit.
A. $17,532.49.
Q. Now, please deduct from that the credit, and give me the net amount.
A. $17,227.32.
Q. Now, if that amount be added to what you gave on Exhibit No. 10, what will be the result?
A. $131,608.76.
Q. And that last amount represents the expenditures made in 1850, on account of construction, as shown by the books.
A. Yes sir
Q What amount do you show on Exhibit 10, as having been paid out in 1851?
1538 A. $129,359.18.
Q. Now, please turn to page 2, of your Exhibit No. 3, and give me the amount there paid out, January to April, 1851 on account of construction.
A. $16,419.44.
Q. Now, on the same page, amount paid out from May to June 1851.
A. $3,468.64.
Q. You didn't add the lower part there, on page 2 immediately below your credit statement there, what is the amount included——
A. Oh, I beg your pardon, I see—$7,468.64.
Q. Now, please turn to page 3, and give me the amount there, June to September, 1851.
A. $43,655.64.
Q. On the same page, 3, please give me the amount included between September and November.
A. $11,240.05.
Q. On the next page, 4, please give me the amount indicated as being paid out in December, of that year.
A. $52,594.96.
Q. Is it 96 or 98 cents? It ought to be 98 cents to balance.
A. 96 cents, I make it.
Q. 96 is right, is it?
A. Yes sir.
Q. Now, on page 7 of that same exhibit, give me the amount paid out from May to December, 1851, "cord wood."
A. $2,078.73.
Q. Now, will you please give me the amount on page 8,
1539 paid out April to September 1851, on account of surveying and engineering?

A. $2,429.13.

Q. On page 9, please, October to December, 1851, state the amount paid out on account of surveying and engineering.

A. $1,205.91.

Q. On page 10, please state the amount paid out from May to December, 1851, account "cross ties."

A. $34,734.01.

Q. On page 11, please state the amount paid out from May to October, 1851, office furniture, and so forth, account.

A. $349.19.

Q. On page 12, from March to December, 1851, please give me the amount paid on account of relinquishment of right of way.

A. $3,968.98.

Q. Now, on page 13, please give me the amount paid out, or the amount charged, if you please, between April and July, on account of discounts.

A. You mean between February and July.

Q. Oh, well, on page 13, it is April, May, June and July. You will find July under the head, fifth; you will find July the first item, and taking them——

A. It is February; it ought to be.

Q. You have it "Jul." here; it is a misprint then. Shall we make it "February"?

A. Yes, sir, February 5th, page 48, $25,704.

Whereupon, the hour of twelve o'clock having arrived, the further hearing was continued until two o'clock p. m.

1540 INDIANAPOLIS, *October 11th*, 1899—Two o'clock p. m.

The parties met pursuant to adjournment.

Present: The same as here before, except Mr. Taylor, on the part of plaintiff's counsel, and Mr. Maxwell, on the part of the defense.

The cross-examination of the witness GEORGE C. DUY, was resumed, as follows:

By Mr. WILLIAMS:

Q. Now, Mr. Duy, please turn to page 14, of the same Exhibit No. 3, and if you find anything there charged out from June to December, 1851, please give it to me.

A. $15,494.

Q. Now, turn to pages 15 to 17 inclusive, of Exhibit No. 3 and if you find an account of anything paid out, during the year 1851, please give it to me.

A. $370,048.76. On page 19 there is more.

Q. One moment, in order to keep my figures correct will you not please take out of that last item you gave the credit for 1851 that appears on page 17 and give me the balance as you have got it stated on your exhibit?

A. The balance is $369,412.15.

Q. That is, deducting the credit of $636.61?

A. Yes sir.

Q. At the bottom of that page 17, you note that the secre-
1541 tary in his printed statement of December 31, 1851, showed railroad iron, and so forth, account, to be $406,060.46?

A. Yes sir.

Q. Making a difference between the figures you have just given me and the secretary's statement, of $36,648.31; and you say that difference is probably accounted for in three accounts appearing on the ledger, namely, the M. & I. R R. Co., $4,515.50, W. N. Jackson, $31,383.81, and Wood & Lowe, $750. making $36,648.31. Now, will you please take the ledger and journal and tell me what those three accounts were for, and what became of them?

A. The first item to the credit of Madison & Indianapolis Railroad Company in that year, on the Ledger A, page 40, is taken from Journal A, page 103, a charge to W. N. Jackson, $800; the second entry, is on journal page 139, charged to the treasurer, and credited to the M. & I. Railroad Company, for amount paid by W. N. Jackson, for amount charged to them for twenty shares of stock sold to C. W.—its looks like Basnett; I don't know whether it is or not. The third item of credit, is on journal page 131, Madison Railroad Company is credited with railroad iron account, $6.923.98, cross ties, $165.94, equipment account, transportation $212.77, building eleven box cars, less the wheels and axles, $3,630, work in Indianapolis shop, $242.79, less overcharge on July bill, $251.52, making a total amount to equipment $3,834.04, and the total amount credited on this date, $10,923.96. On page 145 of the journal is a credit,
1542 credited for bills, September 1st, 1851, to-wit, for railroad iron account, and exchange on draft, $2,914.39, for union track and exchange, $1,611, making a total of $4,514.50. On the other side——

Q. You mean the debit side of the ledger?

A. The debit side of the ledger, beginning on August 28, 1851, page 79 of the journal, Madison Railroad Company is charged, Winslow, Lanier & Company, for sight draft in favor of John Brough, $4,490.04, exchange account, $22.46, making $4.514.50. On December 10, 1851, journal page 99, Madison Railroad Company is charged and treasurer is credited, amount received of Gillette, for twenty shares of stock $800, April 10, 1852, journal, page 128, Madison Railroad Company is charged for amount paid to treasurer of said company for W. N. Jackson, being amount received by him from Charles W. Basnett for twenty shares of stock $850. On page 138, Madison Railroad Company is charged treasurer for cash on account of above bill, $5,000. The above bill is a credit item which I read before, and the bills payable for note at ninety days from January 9th, and in full of above bill, $5,923.96, making total debit of $10,923.96.

Q. And what was the total credit on the ledger? Does that balance the account, I mean?

A. That balanced the account; a credit of $4,414.50 June 29th, balances the account.

Q. June 25th, 1852?

A. Yes sir, there are two items in 1851 which balance each other, which I did not give.

Q. What is the W. N. Jackson account?

1543 A. The W. N. Jackson account begins in 1851. He is charged with various items down to April 26th, 1852, appears to be, to Winslow, Lanier & Company, and C. R. Peddle, and to treasurer, to sundries, and he is credited on the other side with various items aggregating the same as the debit side.

Q. Do you find there, at what time, if at all, that a balance is struck of $31,383.81, which you mention in your exhibit?

A. Well, that balance would be May 31st—No, that would be at the end of 1851. Let me see my balance sheet, (referring to balance sheet). This is in balance sheet of December 31st, 1851; in our balance sheet, not the secretary's.

Q. You cannot tell me what that Jackson account was for without going into it in detail?

A. Not without going through it and analyzing it and getting it from the journal. It would be quite a little job, but I could do it.

Q. Take the Wood & Lowe account, could you tell me generally what that was?

A. That runs into another account of Weld & Company, and into the account of W. N. Jackson, and into the railroad iron account, six items posted on the debit side and three on the credit side, and it is balanced.

Q. Well, is that balance of $750, a balance that existed at the close of 1851?

A. I presume so (referring). Yes sir. December 31, 1851.

Q. Do either one of these three accounts that you have just

1544 been talking about ever get into construction account in any way?

A. I cannot answer that off-hand. My impression is that they do, part of them. I think Wood & Lowe handled spikes, but I cannot tell you. I find a credit to Wood & Lowe, on page 120, equipment account and railroad iron account, transferred to those, and those accounts afterwards go into construction. That is just one large account. I can look at the others, if you want me to.

Q. I will not take up your time with that now.

A. My impression is that they all go into construction account afterwards.

Q. This statement of the secretary to which you refer in this Exhibit 3, on page 17, is the printed statement that is found in the annual reports, is it not?

A. Yes sir, either his balance sheet—it purports to be an abstract of the books of the T. H. & I. Railroad Company, December 31st, 1851. I don't know whether it is statement No. 1, or whether it is a balance sheet, I cannot tell.

Q. I will ask you to look at the book I hand you, being a volume

of the printed annual reports, and say whether or not that abstract of account which appears there signed by the secretary, is the one to which you referred in your exhibit?

A. Yes sir.

Q. It is report of the secretary for the year ending December 31st, 1851?

A. Yes sir.

Q. And in that report appears this item, to which you referred in your exhibit, does it not? "Railroad iron, chairs, spikes and
1545 laying, $406,060.46"—that is, you say it did?

A. Yes, it did.

Q. Please turn to page 19 Exhibit No. 3, and if you find anything there showing an expenditure from July to November, 1851, on account of construction, please give me the amount.

A. $7,445.77.

Q. Now, on page 20, of the same exhibit, if you find anything there showing payment from January to October, 1851, on account of construction, please give it to me.

A. $10,756.66.

Q. Now, on the next page, page 21, from September to December 1851, if you find anything expended there please give it to me.

A. $3,344.33.

Q. You do not balance with me there, by $500. Do you see it any where?

A. On page 21, do you mean?

Q. Page 21, yes sir; you are $500 more than I am.

A. You are right. It is $2,844.33.

Q. Now, please turn to page 24, and if you find any payment there from January to April, 1891, please give me the amount.

A. $1,804.85.

Q. You threw that $14 item into the other year?

A. $1805.85.

Q. No, I think you will find "four" is right.

A. Yes, $1804.85.

Q. You did not include that $14 item there that year?

A. No sir, I put that in the other year.

Q. Now, on page 25, from June to December, 1851, if you
1546 find any payments there, please give them to me.

A. $4,010.90.

Q. That exceeds me a little. You are $78.50 in excess of me, which is a credit.

A. That is a credit on the same page.

Q. So that the right amount is what?

A. I am only giving you the debits all the time; I haven't taken off any credits except in one instance.

Q. But you added that credit in to make up your amount?

A. No, if I take off that credit, off of mine it will give yours.

Q. That you had taken out. It is all right then. Now please turn back to page 2 of that exhibit, and see what credit, if any, you find, to construction there during the year 1851?

A. $513.75.
Q. Now, on page 3, please.
A. $1,505.80.
Q. Now, on page 14, please.
A. $44.05.
Q. Now, on page 21, please.
A. $8,275.52.
Q. On page 27, please.
A. $3,709.35.
Q. But that includes something outside of 1851, does it not? Just take the debits and credits for 1851, on page 27.
A. I haven't given you the debits at all.
Q. No, you gave me a balance, but in order to get a balance for 1851 you took the debits and credits for 1851. You will find three items there in 1851 on one side and four items on the other.
1547 A. There are four items; I have four items on each side.
Q. Yes, you are right; there are four items.
A. The balance on the credit side is $452.
Q. I make it $652.10. There is a ten cents there, sure.
A. $652.10. That is right.
Q. Yes sir, that is right, to the credit.
A. Yes sir; I haven't any aggregate of the debits of 1851, if you want that.
Q. Now please turn back to page 25 and give me a credit which appears there, $78.50.
A. $78.50.
Q. I had taken that out of my statement, but you did not take it out of yours, so that that credit ought to be added to mine. Now, have you the items of 1851 that we have gone over?
A. Not the debit items; I haven't had time to take them down.

Mr. WILLIAMS: Have you them, Mr. Ketcham?
Mr. KETCHAM: I think I have.
Mr. WILLIAMS: If you have, call them, and I will check them.
Mr. KETCHAM: Very well.
The figures were called by Mr. Ketcham and checked by Mr. Williams, and put down by the witness.

Q. Now, Mr. Duy, have you those figures?
A. Yes sir.
Q. Have you added them up?
1548 A. Yes sir.
Q. What do you make the aggregate?
A. $613,717.34.
Q. Is it not $613,617, instead of $613,717? We make it $613,617.34, instead of $613,717.34. We are just out $100.
A. The last item in my amounts is wrong, $100 too much. $613,617.34 is correct.
Q. Now, will you please take your credits from that?
A. The credits are $11,069.72.
Q. Please take that from the other.

A. $602,547.62.

Q. The net balance then charged to construction during 1851, as arrived at by the figures we have just been going over, is $602,547.62?

A. Yes sir.

Q. Now, will you please go to Exhibit No. 4? Will you please turn to pages 17 and 19 of Exhibit 4, and if you find anything there showing payments made in 1851 please furnish me with the amount of them. It runs through from page 17 to 19.

A. Do you want the balance?

Q. Yes sir, the full amount charged on pages 17, 18 and 19.

A. $76,379.74.

Q. Please give me the net balance.

A. The net balance is $76,309.74.

Q. Now, will you please turn to page 26 of the same exhibit, and if you find any payments made there in 1851, please give me the amount of them.

A. Net, $11,091.18.

Q. Will you please give me the aggregate of those two amounts?

1549 A. $87,400.92.

Q. Now, will you please add them to the net balance you had a while ago of six hundred odd thousand dollars and give us the total amount for 1851?

A. $689,948.54.

Q. Your Exhibit No. 3, carried the itemized construction account from the beginning to June 30, 1852?

A. Yes sir.

Q. And your Exhibit No. 4, carried the itemized construction account from June 30, 1852, to December 31, 1852?

A. Yes sir.

Q. At the beginning of your Exhibit No. 4 you carried a balance from Exhibit No. 3 of $1,008,908.27?

A. Right.

Q. Your Exhibit No. 4 closed with $1,311,672.59. Now will you state the difference between those two quantities as representing the amount charged on this Exhibit 4?

A. $302,764.32.

Q. Now, we have already taken out of that exhibit, Mr. Duy, $1,766.27, on account expenditures in 1849, and $87,400.92, on account of expenditures in 1851? Now, will you take the aggregate of those items for 1849 and 1851 and from the net difference between the beginning and ending of your Exhibit No. 4?

A. It leaves $213,597.13.

Q. Then, if our figures are correct that ought to represent expenditures on Exhibit No. 4, for 1852?

A. Yes sir.

Q. I think it worth while for all of us to prove that, and see whether it *ne* right or not, and we can do it in this way:

1550 Will you please take down, Mr. Duy, this revised statement of the distribution of construction account among the several

years. I will give it to you as I have made it: Expenditures on account of construction in 1847, $3,500.39; expenditures on account of construction in 1848, $1,436.55; expenditures on account of construction in 1849, $85,214.02; expenditures on account of construction for the year 1850, $131,608.76; expenditures on account of construction during the year 1851, $689,948.54, expenditures on account of construction during the year 1852——

A. You have only got the first half of 1852; you haven't got all of 1852.

Q. That is correct. Have you made any figures by which you could tell in 1852 that I didn't take out?

A. No sir.

Q. Then we can do it the same way we did the others. I have got them here but they are all in detail.

A. We might test it in a minute and see whether they are correct or not. I will aggregate these and add what you have got to it, and see whether it balances or not.

Q. Your Exhibit No. 3, being from the beginning to June 30, 1852, goes of course from nothing to $1,008,908.27? Now, out of that we have taken for years other than 1852, the following items: For 1847, what was it?

A. $3,500.39.

Q. For 1848?

A. $1,436 55.

Q. For 1849?

1551 A. $85,214.92.

Q. We have not taken that out?

A. That is the aggregate I have got; I didn't get what you have checked out.

Q. We haven't taken out of Exhibit No. 3. We have taken that out less, $1,766.25.

A. I think the shortest way to get at that, it strikes me the shortest way to get at it, is to take 1852 off 1853, the first half of 1852, for I cannot tell what you have taken out.

Q. All right, we will go that way. Please to turn to page 4 of Exhibit No. 3, and give me the amount charged on that page for the year 1852.

A. $14,129.86.

Q. Now, on page 5, please give me the amount charged on that page for the year 1852.

A. $681,932.34. That covers all that big railroad iron account.

Q. The trouble with that is that these exhibits which are made a part of Exhibit No. 3, by you, and the aggregate of which you find on this page 5, contain in them a large amount of items that do not belong to 1852?

A. That is right.

Q. And if you will please take from that page the aggregate of all of those exhibits, then we will take the exhibits separately, and I will see what belongs to 1852.

A. Can you tell me how much you have got for the first half of the year 1852?

Q. On page 5, amount chargeable in the year 1852 exclusive of these accounts that you have put in your exhibits,
1552 these amounts that you bring forward in your exhibits, is $7,107.86; that is excluding the exhibits entirely.

A. That is right.

Q. You say that is right?

A. I don't know.

Q. Do you want to see?

A. On page 5?

Q. Yes sir; you will notice at the top there is Exhibit A, which you must also exclude. Now below the exhibits there are some items.

A. No, I do not make it that way.

Q. What do you make it?

A. Yes I do; $7,107.86. That is right.

Q. Now, if you will turn to page 6, at the top there, you will see an addition which is to be made because of a correction in the journal. Will you state what that is? It is a little item of $52.73, which you correctly note should be $.71.

A. Yes sir, that is a correction of two cents.

Q. But it is an addition to the amount of $52.71 which you carried out as seventy-three cents; so please add that $52.73, or put that in your list of amounts expended in 1852.

A. Yes, that is correct.

Q. Now, will you go to page 7 of Exhibit No. 3 and give me the amount charged there for the year 1852.

A. Will you allow me to ask what you did with the amount on page 2, on page 4?

Q. I will show you, yes sir.

A. Page what did you say?

Q. Page 7; what amount is chargeable there in 1852?

1553 A. $2,263.80.

Q. Now, please turn to pages 8 and 9, the exhibit giving surveying and engineering.

A. They don't appear to be any 1852 on page 8.

Q. No, I don't think there is, but give me the amount on page 9 then, charged to construction in 1852.

A. $2,220.61.

Q. Now, turn to page 10 please and give me the amount charged there for the year 1852.

A. $7,343.83.

Q. Now, please turn to page 11 and give me the amounts shown on that page as having been expended in 1852.

A. $58. Even.

Q. Now, turn to page 12 and give me the amount shown on that page as having been expended in 1852.

A. $415.

Q. Now, on pages 13 and 14—none on page 13—but on page

14, the amount shown on that page as having been expended in 1852; give me the net, please, after allowing for the credits.

A. $39,421.41.

Q. Now on page 18, will you please give me the amount there expended in 1852, less any credits?

A. $58,003.09.

Q. Now, page 19, please to give me the amount shown to have been expended in 1852.

A. $6,953.90.

Q. Now, on page 22, please give me what is shown there as having been expended in 1852, the net amount.

A. $53,737.84.

Q. Now, turn to page 26; please give me the amount shown
1554 there to have been expended in 1852; contingent account, it ought to be.

A. $1,957.06.

Q. Now, will you please add the following tabulated amounts

$14,129 86
7,107.86
52.71
2,220.61
2,263.80
7,343 83
58.00
415.00
39.421.41
58,003.09
6,953.90
53.737.84
1,957.06

and give me the amount.

A. $193,664.97.

Q. Now, to that will you please add what you had as being the amount expended in 1852 as shown on Exhibit 4, namely $213,597.13.

A. The total is $407,262.10.

Q. Now you have the figures I gave you for every year except 1852, haven't you?

A. Yes sir.

Q. And now you have 1852. Will you add them up and see what the total expenditure makes.

A. $1,318,970.36.

Q. Well that amount should be $1,311,672.59, should it not?

A. That is my recollection; I haven't got it here.

1555 Q. Let us know what the excess is.

A. The excess is $7,297.77.

Q. Now, will you please turn to page 7 of Exhibit No. 4?

A. Yes.

Q. And give the amount of credit shown by that exhibit that should have been for 1852?

A. $3,974.54.

Q. Now, will you please turn to page 4, of that same exhibit and give us the credit that should have been given there.

A. $1,102.59.

Q. But you have already given $3,974.54, which is included in that credit.

A. The other credit is seven thousand—$7,028.05.

Q. That don't do any good because when we took that last half of 1852, in the manner in which we reached it, we handled both of those items, and left the net balance of $213,597.13; so that that don't explain it at all. Now, if you will permit me, we will get back. We have made a mistake somewhere in calling over the amounts to you. What have you showing the expenditures for the year 1847?

A. $3,500.39.

Mr. KETCHAM: That is, Mr. Williams, as you have called them over to him to put down in this examination.

Mr. WILLIAMS: Yes sir.

Q. Now, for 1848 what have you?

A. $1,436.55.

Q. For 1849?

1556 A. $85,214.02.

Q. What have you for 1850?

A. $131,608.76.

Q. What have you for 1851?

A. $689,948.54.

Q. Do you know where you got that? Have you got your figures there?

A. I have got six hundred and two thousand plus—$602,547.62 from Exhibit 3, and I get $76,309.74 and $11,091.18 from Exhibit No. 4.

Q. Now, what have you for the amount as shown for 1852 on Exhibit 4?

A. That is $213,597.13.

Q. Now, what do you have for the second?

A. $193,66497.

Q. What is the difference between us?

A. $7,297.77.

Q. Now this difference, can you tell us how this can be accounted for?

A. Yes sir. On Exhibit No. 3, at the bottom of page 5, appears a credit to construction account of $7,949.89. Of this sum $652.12 was used and belonged to 1851, leaving $7,297.77, the difference above stated.

Q. And that last amount should go as a credit on expenditures on the first half of 1852?

A. Yes sir.

Q. Now if that credit be given will you please state how the total amount of construction at the close of 1852 would be distributed into the various years, giving the amount for each year in accordance with the Exhibits Nos. 3 and 4.

1557 A. The construction account would be distributed as follows:

For 1847	$3,500.39
For 1848	1,436.55
For 1849	85,214.02
For 1850	131,608.76
For 1851	689,948.54
For 1852	399,964.33

Q. Now what is the total?
A. $1,311,672.59.

Mr. KETCHAM: This $652.10 really is in the $689,948.54.
The WITNESS: It was credited on 1851.
Mr. KETCHAM: Ought it not to come out of that $689,948.54?
The WITNESS: It has been taken out.

Whereupon, the hour of four o'clock and thirty minutes having arrived, the further hearing was adjourned until tomorrow, Thursday, October 12, 1899 at 10 o'clock a. m.

1558 THURSDAY, *October* 12, 1899—10 a. m.

The parties met pursuant to adjournment.
Present the same as on yesterday.

The cross-examination of the witness GEORGE C. DUY, was resumed as follows:

Questions by JOHN G. WILLIAMS:

Q. Mr. Duy, in the secretary's report for the year ending December 30, 1852, in addition to construction account amounting to $1,311,672.49 there are two other items shown namely, union track, $5,408.40, and union depot $7,817.87. Were these two items of track and depot in any way taken into account in either of the Exhibits 3 and 4 from which we got our figures yesterday?

A. I think not.

Q. Well, be sure please.

A. (Looking at books.) What is the amount of union track?

Q. Union track, $5,408.40 at the close of 1852. Mr. Duy, to refresh your recollection, I will call your attention to your statement of construction for the year 1856 where you show for the first time a transfer of union depot and union track to construction. On page 1 Exhibit 8 you will find a transfer of the total union track and depot account made that year.

A. What is the aggregate of this?

Q. The aggregate of these items at the close of 1852?
1559 A. Yes sir.
Q. $13,226.27.
A. Here is $13,254; is that one item?
Q. $13,226.27 is the amount of the two items I gave you.
A. I do not find that amount here, but there are two items from union track charged to construction account, one in December 1850 and one December 1851. I think that those balances that you speak of ultimately got into construction account about 1856.
Q. They are not included however in the itemized statement of construction.
A. No sir.
Q. Being Exhibits 3 and 4?
A. No sir, they were not in.
Q. Do the books show an expenditure in or prior to the close of 1852 for that amount, namely, $13,226.27, on account of union depot and tracks?
A. Prior to '52?
Q. Prior to and including '52; up to the close of 1852.
A. The books show union track and expenditure of $5,298.40.
Q. For track?
A. For track.
Q. Now for depot?
A. $7,817.87.

(By Mr. KETCHAM:)

Q. For track?
A. For depot.

(By Mr. WILLIAMS:)

Q. There is a difference of $110 between the amount given for track by the secretary and the amount you have just given
1560 me. Do you find an explanation of that?
A. I find a credit.
Q. A credit in '52 or prior to it?
A. No, that is in '53.
Q. The expenditure then in '52, up to the last of '52, was $5,408.40, on account of track, union track.
A. Yes sir.

Mr. KETCHAM: $5,298.40?
Mr. WILLIAMS: Well that difference grew out of the credit of $110 that was made in 1853.
The WITNESS: That $110 which is charged in '52 is the amount paid to John W. Ray for right of way, and it is credited back in '53 the same item.

Q. Well the expenditure had been made?
A. Had been made, yes sir.
Q. So that the books then, Mr. Duy, do show an expenditure on

account of union track and depot prior to the close of 1852 of $13,226.27?

A. $13,226.27?

Q. Yes.

A. Yes sir.

Q. Now will you please add that amount to the expenditure shown by Exhibits 3 and 4 for the year 1852, namely, add that amount to $399,964.33 and give me the result.

A. $413,190.60.

Q. That agrees with our figures. Mr. Duy, will you please turn to Exhibit 5, being your itemized construction account for

1561 the year 1853, and give me the amount shown by that exhibit to have been expended for items of construction during the year 1853?

A. The net amount?

Q. Yes sir.

A. $102,611.81.

Q. On page 6 of that Exhibit 5 I see you note an error of ten cents in the secretary's balances as given in his printed report.

A. Yes sir.

Q. But otherwise it agrees with that?

A. Yes sir.

Q. In the secretary's report for the year ending December 31, 1853, he shows an amount of expenditures on account of union depot and track combined of $21,241.45, which is an increase over the report for 1852 on account of those two items of $8,015.18. Please tell me whether or not this last named amount is shown by the books to have been expended during the year 1853 on account of union depot and tracks?

A. I only make that $5,811.34. Oh, here is more. I don't make that exactly as you do.

Q. What do you make it, Mr. Duy?

A. I make the net $7,861.65.

Q. Well, that is a difference of $153,053. Do you find anything like that anywhere around there?

A. No.

Q. Can you make it, Mr. Duy?

A. Why the expenditure of the two accounts in '53 appears to be only $2,210.39.

1562 Q. You have a trial balance for those two years, haven't you?

A. Yes sir.

Q. Would you look at that, please, and see if that would throw any light on it.

A. The expenditure in the two accounts is correct, $8,015.18.

Q. In the two?

A. Yes sir.

Q. Now, none of that amount was included in your Exhibit 5, was it?

A. No, sir.

Q. Now, will you please add $8,015.18, being the amount expended in 1853 for union depot and tracks, and $102,681, being the amount of expenditures shown during that year by Exhibit 5, and give me the result?

A. $110,626.99.

Q. Please turn to Exhibit 6, Mr. Duy, being your itemized construction account for the year 1854 and give me the amount expended on account of construction for that year, exclusive of the credit which is shown on it.

A. $25,618.68.

Q. What credits appear on page 2 of that exhibit to construction account?

A. The items?

Q. Yes, give me the items.

A. Received of E. & C. R. R. Co. one half cost of culvert at National road, $32; by certificate of interest $190.05; by real estate, amount transferred, $13,117.12; total $13,339.17.

1563 Q. That will be all I want for the present. Will you please explain that item of amount transferred on account of real estate $13,117.12

A. That represented real estate accumulated by donations and purchase from 1849 to the close of 1852, which had been charged into construction account, or depot, union depot, &c., and is taken out of construction account by this charge

Q. Where did it go, into real estate, Mr. Duy?

A. My recollection is it goes back into real estate account. It went back to real estate account.

Q. It was not then in fact a credit on construction account, except a mere book credit, resulting from a transfer from one account to another.

A. That is right.

Q. I will ask you in that connection, to refresh your recollection, if in 1856 it was not transferred back to construction account?

A. Back again; that is my recollection.

Q. I will ask you also if the secretary in his printed report for 1854 and subsequent years did not carry construction account as it was, regardless of that credit of $13,117.

A. He carried that in a separate item, I think.

Q. $13,226.27

A. Whatever it was; my recollection is that he carried it in a separate item.

Q. No, you are mistaken about that. Will you look at his report; take the report for the year 1854 and state what he gives as the total amount of construction.

A. $1,439,681.13

1564 Q. Now, will you please look at your exhibit for that year, that is, Exhibit 6, and give me that amount that you show in construction at the close of that year, on page 2 of Exhibit 6?

A. At the close of '54?

Q. Yes.

A. $1,414,284.40.

Q. No, Mr. Duy; Exhibit 6, page 2.

A. $1,426,564.01.

Q. Now I will ask you if the difference between the secretary's amount and this amount in your exhibit is not exactly $13,117.12?

A. Yes sir.

Q. Mr. Duy, what does the secretary's report for the year 1854 show as expended on account of Union depot and track?

A. $25,640.78.

Q. And what did he show as that expenditure for the year 1853?

A. For '53, $21,241.45.

Q. I will ask you what is the difference between those two amounts?

A. $4,399.33.

Q. Now, do the books show that that amount $4,399.33 was expended in the year 1854 for Union depot and tracks?

A. Yes sir.

Q. Excluding the credit for amount transferred to real estate but including the other two credits on page 2 of Exhibit 6, what is the net amount shown by that exhibit to have been expended for construction in 1854?

1565 A. $25,396.63

Q. Now please add to that amount you have just given me the amount expended during the year 1854 for union depot and track?

A. How much did I say that was?

Q. $4,399.33, you said it was.

A. $29,795.96

Q. Please turn to Exhibit 7, being your itemized construction account for the year 1855, and give me the amount shown by that exhibit to have been expended for construction in that year.

Mr. KETCHAM: That is, net.

Mr. WILLIAMS: There are no credits that year at all.

A. $36,844.78

Q. Does that amount agree with the amount shown by the printed report of the secretary for that year?

A. I don't know.

Q. Will you please look? (Handing printed report to witness.)

A. Yes sir; it does.

Q. What is the amount charged in that year 1855 in the secretary's printed report on account of union depot and track?

A. $25,640.78

Q. That amount is the same as it is in his report for the year 1854?

A. Yes sir.

Q. Showing no expenditures that year on account of those items?

1566 A. That is right.

Q. Now, please turn to Exhibit 8, being itemized construc-

tion account for 1856,—and 1864 is the heading of it,—and give me the total amount shown by that exhibit as charged construction for the year 1856.

A. $152,356.43.

Q. Now, Mr. Duy, I will ask you if you find included in that amount which you have just given me an item of $13,847.12, and an item of $25,640.78, being respectively real estate account transferred and union track and depot account transferred?

A. Yes sir, they are both included.

Q. Now in the figures you have already given me you have included in the expenditures of previous years, $13,117.12?

A. Yes sir for real estate.

Q. For real estate; and $25,640.78 for union depot and tracks.

A. Yes sir.

Q. Now will you please deduct the aggregate of those two items, namely, $13,117.12. and $25,640.78, from the amount of expenditures for construction you gave me just now, as shown by Exhibit 8?

A. It leaves $113,598.53.

Q. Those two items which I asked you to deduct from the construction account as you first gave it to me, are simply transferred accounts, are they not?

A. Yes sir.

Q. Transferred to construction at the close of the year 1856?

A. Yes sir.

1567 Q. And we had included all but $730 of that amount in stating the expenditures for previous years, had we not?

A. $730, yes sir; put in in 1856.

Q. On page 1 of this Exhibit 8 you show a credit of $4,315.22, from profit and loss account for excess of cost of road over aggregate of stock and bonds. That credit is simply a book entry, isn't it?

A. Yes sir, by order of the board of directors, I think it was made to make the cost of construction equal the issue of stock and bonds.

Q. And except in that way it in no wise reduces the actual amount expended?

A. Not at all.

Q. Please take down these actual expenditures as we have stated them this morning and give me the aggregate of them; 1852 as amended by the addition of union

Depot and tracks	$413,190.60
1853	110,627.09
1854	29,795.96
1855	36,844.78
1856	113,598.53

A. Is that all?

Q. Yes. that is up to the close of 1856.

A. $704,056.96.

Q. Now, Mr. Duy, will you please give me the aggregate amount of the following items of actual expenditure as we stated them yesterday prior to 1852:

	1847	$3.500.39
	1848	1.436.55
	1849	85,214.02
	1850	131,608.76
1568	1851	689,948.54

A. $911,708.26.

Q. Now, Mr. Duy, will you please add together the aggregate for the years up to and including 1851 and the aggregate for the years from 1852 to 1856 inclusive, which you gave me just now as follows

To 1851	$911,70 .26
From 1852 to 1856, both inclusive	704,056.96

A. $1,615,765.22.

Q. Will you please deduct from that last amount $4,315.22, being the amount transferred from profit and loss to construction account, and give me the balance?

A. $1,611,450.00.

Q. And doesn't that balance, Mr. Duy, with the books,—with your statement?

A. Yes sir, is that twenty-two or twelve?

Q. Twenty-two; $4,315.22.

A. I recollect that the ten cents was credited on one of my statements.

Q. Please turn to the secretary's statement No. 4, in the annual report for the year 1856.

A. Yes sir?

Q. In that report, he charges does he not, union depot and tracks separately?

A. Yes sir, he reports it separately.

A. Yes sir, that is what I understood. But he carries it out to make up the aggregate amount of expenditure.

A. Yes sir.

Q. That construction account remained at $1,611,450,
1569 until April 1864, did it not?

A. Yes sir.

Mr. WINTER: Closed at that.

The WITNESS: The account stood at that until April 1864.

Q. In April 1864 what was added to it, if anything?

A. The amount of a stock dividend of $376,700.

Q. What was the total, dividend declared, Mr. Duy?

A. $380,612.50.

Q. And what was done with the difference between the total dividend as declared and the amount carried into construction account?

A. Paid in cash.

Q. And what did that amount to?

A. $3,912.50.

Q. That was paid in cash?

A. Yes sir.

Q. And the balance in stock?
A. Yes sir.
Q. Noting the addition of that stock dividend how did the construction account stand?
A. $1,988,150.
Q. And was anything more entered upon it from that date up to the close of the term ending January 17, 1873?
A. No sir, nothing was added to that.

Whereupon, the hour of 12 o'clock having arrived, the hearing was adjourned until 2 o'clock p. m.

1570 THURSDAY, *October* 12, 1899—2 o'clock p. m.

The parties met pursuant to adjournment.
Present the same as before recess.

The cross-examination of the witness, GEORGE C. DUY, was resumed as follows:

Questions by JOHN G. WILLIAMS:

Q. Mr. Duy, will you please turn to Exhibit No. 55, being statement of construction of double track, equipment account construction of T. H. & I. R. R. extension, etc., and give me the total amount as shown by that exhibit of all expenditures in the year 1869?
A. Running them all together?
Q. Just the aggregate. You will find them on pages 1 and 3.
A. $225,291.27
Q. Now, will you please give me the aggregate of expenditure, as shown by that exhibit during the year 1870?

Mr. WINTER: Do you want the betterment expenditures there, Mr. Williams?

A. $403,574.75
Q. No, that is not right; it ought to be $385,690.34; there are only three (3) items, double track, $1,790.94, equipment, one hundred and thirty-eight——

Mr. WINTER: I asked you a moment ago if you wanted the net amounts; he gave you the gross amount, without reference to credits.

1571 Mr. WILLIAMS: I didn't hear you Mr. Winter. I wish the net amount.

A. $385,690.94.
Q. Now, in 1871 there was but one item wasn't there?
A. Yes sir, in 1871 there was $2,094.28.
Q. Now there should be deducted from that, the thousand dollars that is credited in the next year.
A. In 1872, yes sir.
Q. So as to make the net amount what?
A. $1,094.28.

Q. For the year 1871?
A. Yes sir.

Mr. WINTER: Mr. Williams in '71 the equipment is $37,042.92.
The WITNESS: It is wiped out by a credit of the same amount. I don't see anything——

Q. (Interrupting.) In '72, do you mean, Mr. Duy?
A. Yes sir, there are two items in '71 in that construction account and equipment account, if that is what you mean. I didn't go into the construction and equipment account. There are two items there in '71, the first two items, but it is the last day of '71.

Mr. KETCHAM: It is on page 6.
The WITNESS: It is on the last page but one.

Q. Yes I know. I was dealing with the document aside from the exhibit.
A. There is nothing in '72. Oh, charged to road cost, do you mean?
Q. In the exhibit, yes.
1572 A. Nothing in '72 except for construction and equipment.
Q. How much is that,—the net?
A. The net is $207,087.30.
Q. Now these two items that you called my attention to just now on page 6 of the exhibit as being in 1871,——
A. (Interrupting.) They might be considered wiped out by that deduction of $24,000 taken off the gross amount of this account. You will see in the note at the bottom: The total of this account is $231,134.56, and there is $24,000 taken off.
Q. I was going to say: they are taken care of in that balance of '72 of $207,087.30?
A. I think so.
Q. These amounts that you have given in 1869, '70, '71 and '72 correspond with my statement of the matter taken from the books and made on a different basis, different plan, but they balance exactly.
A. That's right, yes sir.
Q. Mr. Duy, what is the first account you have of any earnings? Turn to Exhibit No. 2, itemized transportation account from the beginning to 1854 inclusive.
A. The first item charged to transportation account is November, 1851. A credit to transportation account.
Q. What is the total amount of transportation earnings as shown for that year 1851, the two months of November and December?
A. $1,561.58.
1573 Q. Was there any report made for that year 1851 by the secretary, Mr. Duy?
A. I think not.
Q. Yes there was.
A. Was there, I didn't see it.
Q. Look at the annual report for 1851 now handed to you and see

if you don't find in there a statement of the accounts made by the secretary?

A. Yes sir, I do.

Q. Is that the first statement of account made in that way?

A. That is the first detailed statement.

Q. That amount you have just given as earnings appears in this first report, doesn't it?

A. Yes sir.

Q. And what became of it?

A. It was credited to profit and loss account on the last day of the year.

Q. I wish you would read that report to the stenographer, Mr. Duy. I introduce it in evidence as an entirety.

The said report, being secretary's report of the earnings from the printed report for 1851, was now read in evidence by the witness, and the same is marked "Exhibit No. 56, October 12, 1899, Evans, Rep." and is in the words and figures following, to-wit:

A. (Reading:)

"*Abstract of the Books of the Terre Haute and Richmond Railroad Company.*

DEBTOR.

1574	Capital stock paid in	$362,262.35
	Engineers' certificates, (payable in stock outstanding)	7,574.78
		$369,837.63
	Bill payable, (for railroad iron &c.)	295,360.53
	Six per cent. bonds sold	60,500.00
	Seven per cent. bonds sold	250,000.00
	Sundry accounts, (payments on account unsettled)	2,495.29
	Transportation account (received for passengers,)	1,561.58
	Total	$979,755.03

CREDIT.

Surveying and engineering	$14,594.06
Grading, bridging, etc	320,743.23
Contingencies	12,693.21
Office furniture	499.09
Relinquishment of right of way	4,762.91
Cross ties	34,734.01
Cord wood	2,078.73
Tools and materials	571.88
Depots and water stations	11,091.18
Graveling track	7,445.77
Railroad iron, charges, spikes, and laying	406,060.46

Equipment account (cost of engines, cars, etc.,).....	77,809.74
Discount and interest account	56,220.01
Total.....	$949,304.28
Balance.....	30,450.75

as follows:

1575	Vigo County bonds.....	$16,400.00
	Sundry accounts, bills receivable &c.....	1,672.95
	Amount in the hands of treasurer.....	12,377.80
	(Footed).....	$30,450.75

(It is torn off—the name here—but it is)

CHARLES WOOD, *Secretary.*

Terre Haute, December 31, 1851."

Q. As shown by Exhibit 22 what were the total receipts of the company for the year 1852?

A. $105,943.87.

Q. What were the total expenditures that year as shown by that exhibit?

A. $60,083.82.

Q. Out of that amount od expenditures, how much was on account of operating the road?

A. As I have it classified, and as the secretary has it classified——

Q. That is what I mean: according to your exhibit.

A. Operating the road was $34,497.82.

Q. And what was the balance of that amount you just gave? What was it for?

A. Interest.

Q. On bonds?

A. Interest on,—yes sir, interest on bonds and extra interest on—yes sir, it was all on bonds.

Q. What was the difference between the total receipts and the expenditures for operating the road as classified in your exhibit, and by the secretary?

A. $45,860.05.

Q. No; operating receipts; between the total receipts and the operating expenditures.

1576 A. $71,446.05.

Q. Now these amounts shown as paid on account of interest that year, Mr. Duy, what finally became of them? To what account did they go?

A. I don't think I have anything here to show. They seem to be just charged to transportation account.

Q. You are quite sure they did not go into construction?

A. I will have to look further. I don't know where they went. The interest account on the ledger shows a balance to the debit of

interest to the 31st of December '52 of $31,731.46, and interest is charged to construction $3,974.54, making a total of $25,706; and on the same day interest account is credited by this transportation $25,586, leaving a balance carried down to the next year of $120.00.

Q. Well, then that interest was charged to transportation wasn't it?

A. It was charged to transportation?

Q. And didn't go to construction? It went to the credit of interest?

A. The interest account before that time had been charged by various items——

Q. (Interrupting.) I know; it doesn't enter into construction as shown on your Exhibit 3?

A. No sir; well, I don't know about that.

Q. I mean the stenographer's Exhibit 3?

A. No sir; it isn't in there.

Q. Well the-, Mr. Duy, a part of '52 is on Exhibit 4; will you please look at that.

A. Well.

Q. Is it on that?

1577 A. No, that twenty-five thousand is not on that.

Q. I will ask you, Mr. Duy, if this charge of $25,586 doesn't appear on page 2 of Exhibit 22 in your transportation account. Look at Exhibit 22.

A. Look where?

Q. Look on page 2 and see if the three items going to make up that charge of interest, $25,586, doesn't appear on page 2 in your transportation account?

A. Yes sir, it appears as a charge to transportation account.

Q. Then what does your exhibit show as the net earnings from transportation account for the year 1852?

A. The amount that I have given, one hundred and five thousand and something (Mr. HAWKINS: $105,943.87) as the earnings covers the years 1851 and 1852. I think I stated '51 separately. No, it is '52; that is right. Now you want the net earnings?

Q. For '52 as shown by your schedule which you said agrees with the secretary's report.

A. That is, deducting operating expenses and interest?

Q. Yes sir.

A. $45,860.05.

Q. What are the total receipts for the year 1853 as shown by Exhibit 22?

A. $203,272.21.

Q. How do you get that, Mr. Duy? Of what is it composed?

A. The total footing on page 3 is $249,132.26; that includes a balance of $45,860.05 of '52.

Q. Yes

A. Take one from the other, it leaves $203,272.21.

1578 Q. Well don't it also include that dividend No. 1 of $25,294.24

A. Well, that is put on as a credit, two ninety *six* twenty four; that is charged out in '53.

Q. What were the transportation receipts for that year as shown by that exhibit?

A. That is what I gave you, $203,272.21.

Q. Will you please look near the bottom of page 3 of the exhibit where you say: Leaving the actual receipts for 1853 $177,975.97."

A. Yes sir, I see. I have found what you discovered: "On the above account the apparent receipts for 1853 are $203,272.21; but the transfer March 19, 1853 from surplus not being actual receipts must be deducted, $25,296.24; leaving the actual receipts for '53 $177,975.97."

Q. Well now, isn't that transfer from surplus the dividend number one of January '53?

A. Yes sir, it is for that purpose.

Q. Now, what were the total expenditures in 1853 as shown by Exhibit 22?

A. $66,331.37

Q. That was all that was charged to transportation?

A. Yes sir. No, that is the expenditure.

Q. Sir?

A. Those are the expenditures.

Q. For the year?

A. Yes sir. That leaves out that $ 5,296.24 which has already been deducted from the earnings. It leaves $45,860.05 the balance of '52 which was transferred to surplus account $111,644.60 which was transferred to surplus at the end of '52 and balances the
1579 account.

Q. Well weren't there other expenditures made that year that were not charged to transportation?

A. Oh, I don't know; I am only looking at the transportation account.

Q. Exhibit 22 only deals with transportation?

A. Yes sir.

Q. Now will you please turn to such exhibit as you have which will show me the other expenditures made that year besides those made simply for transportation, and give me the items of expenditure other than operating expenses, other than those charged to transportation.

A. (Looking at exhibits.) This is Exhibit 50; out No. 65. What year are you asking about?

Q. 1853. That only goes from '53 to '56, Mr. Duy.

A. '53 are you asking for?

Q. Yes '53.

A. Taxes $4,427.89. We have the construction expenditures which you got this morning.

Q. Now the other expenditures for that year embrace only interest payments, don't they?

A. The money that was charged to construction account is expenditure.

Q. Well I see; but it was in the shape of interest, wasn't it? Look at the secretary's report for the year 1853, please, and perhaps that will help us some.

A. Interest and taxes; he has this item of taxes in yes sir, and there are three items of interest, and two dividends.

1580 Q. Yes; now all those three items of interest went to construction, did they?

A. I will have to look at that. Twelve months on $600,000 seven per cent. bonds $42,000; interest for six months on $32,100 six per cent. bonds $963; interest for six months on $28,600 six per cent. — $858. There is a balance of interest account which went to the credit of construction that year.

Q. Well, what effect would that have?

A. It would have the effect to reduce the construction account that much.

Q. So that these payments of interest that were made in '53 did not increase the construction account?

A. They did not.

Q. Now, will you please deduct the aggregate amount of those three items of interest you have given and the taxes from the $111,644.60 which you give as the net earnings?

A. $67,823.60

Q. Is that the balance that is left?

A. Yes sir.

Mr. KETCHAM: What is it you deduct, George? Those three items of interest?

Mr. PICKENS: And the taxes.

Mr. KETCHAM: That can't be, because one of them is $42,000 and the other $4,400.

The WITNESS: I haven't got the taxes; you told me to include the interest.

Q. No; interest and taxes.

A. $63,395.71.

1581 Q. Is the balance.

A. Yes sir.

Q. Well, let us start again; we don't agree: Please take these items, Mr. Duy; $42,000 interest; $963 interest; $858 interest; taxes $4,427.89. What do those items amount to?

A. $48,248.89.

Q. Now taking that from the net earnings of $111,644.60, what does it leave?

A. $63,395.71.

Q. Yes sir. Now we agree.

A. That is what I said before.

Q. I know you did. You were right and we were not. I want to admit it. What does the secretary's report for the year 1853 show as the surplus, Mr. Duy?

A. $28,705.03.

Q. Three cents?

A. Yes sir.

Q. And that is made by deducting, in addition to the deductions you have already made, two dividends?

A. Yes and adding the former surplus earnings of '52. The actual balance here is $8,139.22 for this year.

Q. Yes sir. What are the transportation receipts for the year 1854 as shown by Exhibit 22?

A. $239,992.96.

Q. What were the expenditures made during that year as shown by that exhibit?

A. The operating expenses were $80,669.57.

Q. Does that exhibit show other expenditures?

A. Yes sir.

Q. What were they?

1582 A. Interest, $40,962.67; taxes $3,823.17; 1 dividend $44,655; 1 dividend $46,205.

Q. That is shown by your Exhibit 22?

A. Yes sir.

Q. Now did that payment of interest of $40,962.67 go into construction?

A. All the interest that year was charged to transportation account.

Q. The interest then, that year, amounted to $40,962.67 and the taxes to $3,823.17?

A. Yes sir.

Q. What is the aggregate of these two items?

A. $44,785.84.

Q. Now take that, please, from the net transportation earnings of $159,323.39 and give me the balance?

A. The balance is $114,537.55

Q. We will have to go now to Exhibit 23, won't we, Mr. Duy, to get the year 1855? Please give me the total receipts as shown by Exhibit 23 for the year 1855?

A. $287,711.94.

Q. I see you note there that the secretary omitted an item of rent of $199.40 from his printed statement, and you have included that in the amount that you have just given, haven't you?

A. Yes sir. It is also omitted on the other side, expenditures, the same amount. It would bring the balance out the same.

Q. What sum was expended that year, as shown by this exhibit, for operating expenses?

A. $98,009.18

1583 Q. And that leaves a balance of what, deducting that amount from the gross receipts that you gave before?

A. $189,702.76.

Q. And that, I understand you to say, agrees with the secretary's balance, he having omitted that item of rent on both sides of the account, both receipts and expenditures?

A. Yes sir, that agrees with his balance, net earnings, $189,702.76.

Q. Now, what other expenditures do you show on your exhibit besides these operating expenses?

A. Interest $35,291.13; taxes $6,084.31; making $41,375,44.

Q. Now did that item of interest go into construction?

A. No sir, I think not.

Q. Please make sure of it?

A. Interest paid that year is all charged to transportation.

Q. Now please deduct the aggregate amount of interest and taxes from the balance you had of $189,702.76 and give us the remainder.

A. $148,327.32. Then, there are two dividends paid.

Q. Yes, I don't care to encumber the record with them particularly. We can take them up in another way. Please turn to Exhibit 24, Mr. Duy, and give me the receipts as shown by that exhibit for the year 1856?

A. $531,875.07. There is $540 omitted on both sides of the report of the secretary.

Q. What does that omitted item of $540 on both sides represent?

A. It represents an amount overpaid on freight charges.
1584 The secretary has receipts that much less, and has omitted to put it on the expenditures. It balances.

Q. What were the expenditures during that year as shown by this exhibit on account of operating the road?

A. $160,378.09. That leaves a balance of net earnings $371,496.98 which agrees with the secretary's statement.

Q. What other expenditures are shown by that exhibit as having been made during the year 1856? Just give them to me, please.

A. Taxes $629.06; interest $28,474.11.

Q. What is the aggregate amount of those?

A. $31,103.17; no, $29,103.17. That leaves $342,393.81.

Q. Was that interest charged to construction account in any way?

A. All charged to transportation.

Q. Mr. Duy, where are these taxes charged, that we have been going over,—I haven't asked you about them,—for these years?

A. The taxes for this year are charged, in January, February and November, 1856, on Ledger B page 120.

Q. To what account, Mr. Duy?

A. Taxes.

Q. Oh, there was an account for taxes, was there?

A. Yes sir.

Q. Were these charged in the same way in other years?

A. I think so, yes sir; I can see if you want me to. They are charged to taxes and then transferred in one item to transportation account.

Q. No, I don't care for that; it isn't material.

A. They are charged to taxes and credited to treasurer; then at the end of the year they are transferred to transportation
1585 account in one item.

Q. Now Mr. Duy, on page one of Exhibit 24 you show transferred to profit and loss account $217,051.81?

A. Yes sir.

Q. I will ask you if that amount is what remains after deducting the two dividends that you show in the exhibit from the net income for the year, given by you just now at $342,393.81?

A. Yes sir, that is the balance of the net income?

Q. Yes, the balance of the net income.

A. The net income in my statement and the secretary's both is $371,496.98, so-called. Take off taxes and interest from that, twenty-nine thousand and something, leaves $342,393.81. Deduct from that $125,342 for two dividends leaves $217,051.81 transferred to surplus.

Q. Yes, but I understand you to say that that item of interest and that item of taxes did not go into construction account, but came out of transportation account?

A. Came out of transportation account.

Q. Turn to Exhibit 25. Will you please give me the total receipts as shown by that exhibit for the year 1857?

A. $481,271.59 for the year ending November 30, 1857.

Q. I was going to call your attention to that point just now; Mr. Duy it is true, is it not, that the fiscal year was changed in 1856?

A. In 1856.

Q. So as to end on the 30th of November instead of the 31st of December?

1586 A. Yes sir. All the figures on the last statement are down to November 30, 1856.

Q. On the preceding year?

A. I mean on the last preceding statement.

Q. But the statement we have now is for the full year ending November 30, 1857?

A. That's right.

Q. Now what is shown by that Exhibit 25 to be expenditures that year on account of operating the road?

A. $210,084.34.

Q. What if any additional expenditures are shown to have been made during that year 1857 by this exhibit?

A. Do you want the item?

Q. Yes, please.

A. Repairing bridges and culverts	$36,912.03
Real estate for depot grounds	100.00
Real estate for gravelling	736.00
Passenger cars	4,514.78
Patent brakes	1,560.00
Baggage, freight and coal cars	9,850.04
Stationary machinery	2,538.84
Extention of depot at Indianapolis	8,896.89

Q. Making a total of what for those additional expenditures?

A. $65,108.58.

Q. Now if the amount of those additional expenditures be added to the operating expenses of $210,810.34 what does it make?

A. It makes $275,192.92.

Q. Now deducting that from the gross receipts as shown by this exhibit what does it leave as the net income for that year?

1587 A. $206,078.67.

Q. That agrees with the secretary's report, does it not?

A. That agrees with the secretary's report. That is what he calls net earnings.

Q. He calls that last amount in his report net earnings?

A. Net earnings.

Q. Now, Mr. Duy, weren't there any taxes paid that year?

A. I don't see anything charged for taxes at all.

Q. Not to transportation, on this exhibit?

A. Oh yes, on this exhibit.

Q. Does it appear on this exhibit?

A. Yes, there are other items besides. There is interest $16,949.77; taxes $6,255.85; making $23,205.62.

Q. Now, was that interest charged to construction, Mr. Duy?

A. No sir.

Q. Charged to transportation?

A. Charged to transportation.

Q. Oh, I beg your pardon, for asking you; the construction, we have seen, was closed in 1856, wasn't it?

A. Yes sir.

Q. I had forgotten that, and we are on '57 now. Now, deducting the aggregate of the interest and taxes from the net earnings, what balance have you?

A. $182,875.05.

Q. Turn to Exhibit No. 26, showing itemized transportation account for the year ending November 30, 1858, and give me the total amount of receipts as shown by that exhibit?

1588 The WITNESS: Here is dividends charged to transportation account in '57.

Mr. WILLIAMS: Yes, I understand, but as I said awhile ago, I am going to treat those separately.

A. $380,274.60.

Q. What are the expenditures shown for that year on account of operating the road?

A. $175,127.93.

Q. What other expenditures were made that year as shown by the exhibit outside of the operating expenses,—in addition to the operating expense?

A. There is interest $18,052.04.

Q. Give me the taxes, now please, if it will not discommode you. They are on the bottom of page one.

A. $7,252.58.

Q. Now, the other items, in detail, please, at the bottom of page 2.

A. Rebuilding bridges and culverts..... $15,890.07
Equipment, car account..... 405.00
Extension depot, Indianapolis..... 715.95
New boiler shops..... 931.19
Legal expense..... 755.60

Q. Now give me the total, please, of the interest, taxes and these additional expenditures you just last read.
A. Together?
Q. Yes sir.
A. $44,002.13.
Q. If that be deducted from the gross receipts, less operating expenses, what balance will it leave as net earnings?
1589 A. $161,144.54.
Q. Please take Exhibit No. 27, showing itemized transportation account for the year ending November 30, 1859, and give me the amount of gross receipts as shown by that exhibit for the year ending November 30, 1859?
A. $357,297.85.
Q. What amount of expenditures is shown on account of operating expenses?
A. $165,568.56.
Q. Taking that from the gross earnings, what does it leave?
A. $191,729.29.
Q. What additional expenditures are shown to have been made that year?

A. Interest and exchange..... $14,426.57
Taxes..... 7,645.67

Q. Then, repairs of bridges, please.

A. Yes, repairs of bridges..... $7,530.98
Extension depot, Indianapolis..... 372.72
Legal expenses..... 70.04
Drawback account..... 1,600.69

Q. That is all, is it not?
A. Yes sir.
Q. What is the total of these additional expenditures?
A. $31,646.67.
Q. Deducting that from the difference between gross earnings and operating expenses, what is left as net earnings for the year?
A. $160,082.62.

1590 Whereupon, the hour of five o'clock p. m. having arrived, the hearing was adjourned until to-morrow morning at ten o'clock.

1591 FRIDAY, *October* 13, 1899—10 o'clock a. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, with the exception of Lawrence Maxwell, Esq., of counsel for defendant.

The cross-examination of the witness, GEORGE C. DUY, was resumed as follows:

By Mr. WILLIAMS:

Q. Mr. Duy, please take Exhibit 28, showing the itemized transportation account for the year ending November 30, 1860, and state the gross receipts from transportation for that year as shown by that exhibit.

A. $404,599.61.

Q. And what were the operating expenses for that year?

A. $171,826.62, as classified by the secretary.

Q. Deducting the operating expenses from the gross earnings what do you have?

A. $232,772.99.

Q. What additional expenditures are shown to have been made that year?

A. Interest and exchange, $18,244.81; taxes $5,738.87; making together $23,983.68; new cars built $5,459.08; new station at Greencastle $1,797.13; rebuilding bridges and culverts, $7,433.38; legal expenses $32.53; overcharges $669.32.

1592 Q. What is the aggregate of those additional expenditures outside of taxes and interest?

A. $15,391.44.

Q. Now please add those additional expenditures, taxes and interest together and deduct the aggregate from the amount you got just now, as being the difference between gross receipts and operating expenses, and give us the balance.

A. $193,397.87.

Q. Take Exhibit No. 29, showing itemized transportation account for the year ending November 30, 1861, and give me the amount of gross receipts for the year as shown by the exhibit.

A. The gross transportation receipts, on Exhibit No. 29, were $377,692.37

Q. What were the operating expenses that year?

A. $159,779.07

Q. Taking that from the gross receipts, what is the balance?

A. $217,913.30

Q. What additional expenditures were made that year?

A. Taxes $5,452.66; interest and exchange $20,321.53; making $25,774.19; legal expenses $717.50, over-charges $846.85; donation to State fair grounds $165.

Q. And those last three items make an aggregate of——

A. $1,729.35

Q. And added to taxes, interest and exchange, what do they make?

A. $27,503.54

Q. Deduct that last amount, please, from the difference between gross receipts and operating expenses and give me the balance.

1593 A. $190,409.76.

Q. Take Exhibit 30, showing itemized transportation account for the year ending November 30, 1862, and give me the gross receipts as shown by that exhibit for that year.

A. $563,314.15.

Q. What were the operating expenses?

A. $200.514.38.

Q. Deducting that last amount from the gross receipts what balance have you?

A. $362,799.77.

Q. What additional expenditures were there that year?

A. Legal expenses, $1,028.81; donation to fair ground $498.30; total $1,527.

Q. There was a large amount of expenditures that year not appearing on this exhibit. Could you tell me on which one of your exhibits it would appear—taxes, interest, new freight cars purchased.

A. There was the one before this that the secretary did not report the legal expenses, interest and taxes on.

Q. Yes, but you did.

A. Yes sir, I did.

Q. It was on your exhibit?

A. Yes sir.

Q. Now, these additional expenditures are not on your exhibit.

A. What year are we on?

Q. The year ending November 30, 1862. There was Government tax on passengers, State and county taxes?

1594 A. That is charged to surplus account, State and county taxes and additional telegram- wire, and revenue tax, and new freight cars.

Q. And interest exchange?

A. I do not see any interest exchange.

Q. $15,255.23.

A. Well, that would be on interest account. That is our number 49, Exhibit No. 46, that would be, and the balance of interest may be the other way this year, I don't know. Only two years the balance of interest was the other way.

Q. After deducting the additional expenditures for legal expenses, taxes and donation to the State fair grounds from the difference between gross receipts and operating expenses, what balance have you?

A. $361,272.66

Q. Please look on page 2 of Exhibit 50 and give me the amount as shown there to have been paid in 1862 for State and county taxes.

A. $4,910.38.

Q. What for additional telegraph wires.
A. $1,086.12.
Q. What for U. S. revenue tax?
A. $2,095.91.
Q. What for U. S. revenue stamps?
A. $51.00.
Q. What for new freight cars?
A. $20,895.04.
Q. To what account were these expenditures charged that year?
A. To surplus.
Q. They were taken out of surplus after the balance of the transportation earnings had been taken to that account?
1595 A. Yes sir.
Q. Please turn to Exhibit 46, beginning on page 20, and state what amount of interest appears to have been paid that year on bonds. There is one item on page 20, and the other at the top of page 21.
A. $15,855.
Q. To what account was that payment of interest charged?
A. It was charged to interest account.
Q. And was it taken out of surplus?
A. That year the credit side of interest account was the larger, and the balance was credited to surplus account.
Q. And what was that balance transferred to surplus that year.
A. $4,832.53.
Q. In other words the company received in interest that year more than it paid out in interest?
A. Yes sir.
Q. And the balance of the items on interest account, both on the credit and the debit side, showed a balance to be transferred to surplus account that year of $4,832.53.
A. As to the debit side of surplus.
Q. Yes sir, the debit side of surplus account.
A. Yes sir.
Q. Have you the secretary's report for 1862 before you?
A. Yes sir.
Q. Will you please look at statement No. 2 where the amount of interest and exchange paid is given as $15,255.23; whereas, your amount just given as interest paid alone was $15,855. There is a discrepancy there of twenty-six cents less than six hundred
1596 dollars. Did you find out any explanation for that? The secretary shows a payment of nearly six hundred less than the interest account shows. I will call your attention to the fact that on page 21 of Exhibit 46, you give $7,805 as September interest, and United States tax on $223,000, seven per cent. bonds?
A. Yes sir.
Q. Now the interest on $223,000 seven per cent. bonds for six months is $7,805, regardless of Government taxes.
A. Yes sir, I see that.
Q. If you cannot explain it readily we will pass on.

A. The journal shows that the interest for that year was $7,805, less United States taxes, $234.15, and interest account is charged, Farmers' Loan and Trust Company September interest $7,570.85; and United States tax account is credited with $234.15 making $7,805, which is charged out for interest and taxes; but the taxes were withheld from the bondholders; they paid them the interest less the taxes. But that don't explain it, I do not see any explanation of that difference now. I cannot find it.

Q. Well, we will go on. Now in view of the account to which we will come directly, the earnings from all sources other than transportation—I am not clear at present how this interest payment in 1862 should be treated—I will ask you to foot up the items I will now give you and deduct the aggregate of those items from the sum of $361,272.66, which you gave me a while ago as the net earnings for 1862, the items I mean are these: Govern-
1597 ment tax on passengers $2,095.91; taxes, stamps, $51; State and county taxes, $4,910.38; new freight cars purchased, $20,895.04; additional telegraph wire $1,086.12; interest $15,855. That is all.

A. $44,893.45

Q. Now, deduct that amount, please, from $361,272.66 and give me the balance.

A. $316,379.21

Q. Was there not also paid during that year a Government tax on dividends? I have in mind the Government tax on December dividend of that year. In which one of your exhibits do you show taxes paid on dividends?

A. I am looking over Exhibit No. 44, and that has that $3,115.69 down in 1863.

Q. Does it?

A. Yes sir.

Q. Well, I apprehend it was not paid really until 1863, although it was charged in here as tax on dividend for December 1862.

A. It does show it in 1863.

Q. How were those taxes on dividends paid? Were they deducted from the dividend, or were they paid in addition to the dividend?

A. Paid in addition to the dividend.

Q. The stockholders got their dividends net?

A. Yes sir

Q. And the company paid the tax on the dividends in addition?

A. Yes sir, that's right.

Q. Take Exhibit No. 31, being itemized transportation
1598 account for the year ending November 30, 1863, and give me the gross amount of receipts, the amount of gross receipts as shown by that exhibit for that year.

A. $774,618.48

Q. What were the operating expenses that year?

A. On my exhibit $319,074, on our statement I mean. $319,074,

Q. You have omitted those four items on the top of page 3, haven't you? No, I beg you- pardon.

A. I said "On this exhibit," because it does not agree with the secretary's.

Q. What is the difference between that and the amount shown by the secretary's report?

A. Ninety-six dollars. My statement is ninety-six dollars less than the secretary's.

Q. And how is that accounted for? The exhibit explains it if you have it there.

A. The secretary's charges incidental expenses $5,020.87.

Q. And in that charge——

A. He includes ninety-six dollars for United States stamps, which on the books is charged to surplus account.

Q. And in your statement that ninety-six dollars taken out of transportation expenses for that year is treated with other charges from surplus account of that year?

A. Yes sir.

Q. Now, what were the additional expenditures that year as shown by Exhibit No. 31?

A. Rebuilding bridges $39,229.73; new buildings and
1599 extensions $3,271.54; donation to fair grounds $234.30; legal expenses $372.65.

Q. What do those items amount to in the aggregate?

A. $43,108.22

Q. Deducting that from your balance as shown by the exhibit of transportation earnings, what does it leave?

A. $412,436.26

Q. There are other expenditures that year not shown upon this exhibit, are there not?

A. Yes sir.

Q. Will you give me the items of taxes paid that year, the Government first, please.

A. The Government tax $10,500.58

Q. That does not agree with the secretary, does it?

A. He does not seem to have any in there at all.

Q. You will find it on the preceding page, at the bottom there; he gives $10.174.05; and what do you make it?

A. The amount charged to surplus account is $10,500.58 revenue tax.

Q. I will call your attention to the fact that the difference between you and the secretary is $326.53, being that amount more on your account than on his?

A. Yes.

Q. Now, will you not find that amount accounted for in these items: "Less Government tax on interest on E. & C. Railroad Extension bonds, $221.53, and Government tax on Cincinnati and Indiana Railroad bonds, $105.00."

A. Yes, where do you find that?

Q. That is in the secretary's report, statement No. 2.

1600 A. It is $326.53.

Q. That is what these two items amount to, and that is the difference between you and the secretary?

A. Yes sir.

Q. Now those two items of $221.53 and $105, were really paid as Government tax, but they were taken out of the interest on those securities then?

A. That is right.

Q. So that the secretary's statement of $10,174.05 is the net amount really that the company paid is it not?

A. Yes sir, that is the net amount that he paid, figuring it that way; but on our side we have got the full dividend credited and the taxes charged out.

Q. It was not a dividend?

A. I mean the interest. We have got the full credit of the interest on the other side, and charged this out.

Q. It brings the same result?

A. The same result exactly.

Q. $10,174.05 is right.

A. When you come to take the earnings outside of this you must remember to take that out.

Q. Now, what was the State and county taxes that year?

A. $5,805.32.

Q. What was paid for interest and exchange?

A. The net debit balance of interest and exchange account is $8,785.22.

Q. That does not represent the full amount of interest paid, but simply represents the net debit balance of that account?

A. The net debit balance for that year.

1601 Q. What was paid that year for new locomotives purchases?

A. $37,343.50

Q. What was paid for new freight cars purchased?

A. $42,705.02

Q. Now will you please give me the aggregate amount of Government, State and county taxes and interests and exchange. Shall I give you the items?

A. If you please, yes sir.

Q. Government tax, $10,174.05——

Mr. KETCHAM: But he gives that as $10,500.58.

Mr. WILLIAMS: Yes, but we explained that difference of $326.53 by showing that that amount was paid by other people's money, and was not paid by the company.

The WITNESS: The books show it the way I have got it, and the statement shows the actual payment.

Q. Now, add to that $10,174.05 the State and county taxes, $5,805.32; also add interest and exchange, debit balance of $8,785.22. What do you get as the total amount of taxes, interest and exchange for that year?

A. $24,764.59

A. Now, will you please state the following items: New locomotives purchased, $37,343.50; new freight cars purchased, $42,705.02; and give me the aggregate of those two items.

A. $80,048.52

Q. Now will you please give me the aggregate of taxes,
1602 interest, new locomotives and freight cars?

A. $104,813.11

Q. And the balance of transportation earnings which you gave me just now as being shown by Exhibit No. 31, or $412,436.26. Now, please deduct from that the aggregate of taxes, interest, new locomotives and freight cars, which you gave me just now as $104,813.11

A. The balance is $307,623.15

Q. And that balance represents the balance of transportation earnings for the year after making all the deductions we have enumerated?

A. Have you counted off that $96, stamps that we had a while ago?

Q. Well, I take it on your basis. It is made on your figures the ninety-six dollars out. In order to make that balance you have just given to agree with the secretary's statement it would be necessary to deduct from it the ninety-six dollars which he included in expenses and which you left out from your statement of expenses, would it not?

A. Yes sir.

Q. Now, will you please make that deduction, and we will have that balance?

A. $307,527.15. That is correct all around.

Q. Please take Exhibit No. 32, showing itemized transportation account for the year ending November 30, 1864, and give me the gross receipts as shown by that exhibit for the year.

A. $1,007,979.21.

Q. What were the operating expenses that year as shown by that exhibit?

1603 A. $467,352.54

Q. Leaving a balance of what amount between the gross transportation receipts and the operating expenditures?

A. $540,626.67.

Q. That exhibit shows no additional expenditures?

A. No sir; that whole business was transferred to surplus.

Q. What expenditures in addition to operating expenses were made that year? Will you give me the taxes and interest first, if you can, like we have it, including Government taxes?

A. Revenue taxes, $99.93, $19,807.65 and $2,722.87.

Q. What is that $19,807.65 for?

A. You will have to look at the surplus account to see that.

Mr. WINTER: It is Government tax on dividends &c.

Mr. WILLIAMS: No, I did not ask you for any Government tax on dividends, Mr. Duy.

Mr. WINTER: On receipts then.

Mr. WILLIAMS: On receipts and machine shop.

Mr. KETCHAM: It just simply says United States internal revenue taxes, no explanation, $19,807.65.

The WITNESS: The $99.93 and the $2,722.87 are taxes on receipts, and that makes $2,822.80, as stated in the secretary's report.

Q. Where, Mr. Duy?

A. On page 9, Government tax on surplus.

Q. Now, there was some more Government tax.

1604 Mr. KETCHAM: You have not given us any explanation yet of that $19,807.65, have you?

The WITNESS: No sir; I am trying to make this statement (indicating) consist with this (indicating). That nineteen thousand dollar item has no explanation on the book at all.

Mr. KETCHAM: You mean the nineteen thousand dollar item in the secretary's report?

The WITNESS: No, that I gave $19,807.65. There is no explanation about that at all.

Mr. KETCHAM: Read the entry.

The WITNESS (reading): Surplus account to sundries, State and county taxes, $576.63; United States internal revenue tax, $19,807.65; stockholders $335,646.09; total $356,030.37.

Mr. KETCHAM: Now, can you turn to stockholders' account and see what that three hundred and thirty-five thousand dollars consisted of?

Mr. WILLIAMS: That is dividend.

Mr. KETCHAM: Then this obviously is Government tax on this dividend.

The WITNESS: Yes, but the secretary has more than I have.

Mr. KETCHAM: There were three dividends that year were there?

The WITNESS: There appear to be.

Mr. KETCHAM: What is the tax on the third dividend?

The WITNESS: The tax on the December dividend 1864, was $10,000.78. I cannot make the secretary's statement and the books agree.

1605 Whereupon, the hour of twelve o'clock and thirty minutes having arrived, the further hearing was continued until Monday, October 16th, 1899, at ten o'clock a. m.

1606 MONDAY, *October 16th*, 1899—10 o'clock a. m.

The parties met pursuant to adjournment.

Present the same as heretofore, except Judge Robert S. Taylor, of counsel for plaintiff, and Lawrence Maxwell, Esq., of counsel for defendant.

The cross-examination of the witness, GEORGE C. DUY, was resumed, as follows:

By Mr. WILLIAMS:

Q. Mr. Duy, when we adjourned last Friday you had started to answer a question concerning the expenditures made in the year

1864, in addition to the operating expenses of that year. I had asked you to give me the taxes and interest, first, including the Government taxes, and you had started to give me the Government taxes, and we found that the amount in your exhibit did not agree with the amount stated by the secretary in his printed report. Since the adjournment have you been able to ascertain the reason for that discrepancy, and can you give me the amount that the Government taxes paid that year should be?

A. Yes, I examined it. The difference was occasioned by charging to the tax account on the ledger four items of taxes paid on the E. & C. bonds and the C. & I. bonds which in our calculations before were taken out of the receipts, about $435, and something, whatever the difference is (referring to the statement for
1607 the year 1864) $435.38 is the difference. The tax on receipts is $18,704.10.

Q. Ten or eleven?

A. I think there is one cent difference there.

Q. And you cannot find the reason of that one cent difference?

A. No sir, I think it is just in making up the statement. The ten cents balances the account on the Ledger.

Q. Now, in addition to that $18,704.10 was there not also a Government tax on machine shops?

A. Yes sir. $668.16.

Q. Making the total Government tax that year on receipts and machine shop what?

A. $19,372.26. One cent less than the secretary's statement.

Q. What were the State and county taxes paid that year?

A. $6,917.10.

Q. What amount was paid that year for interest and exchange?

A. I have it. $6,930.86 paid out.

Q. From which one of your exhibits do you get that?

A. Exhibit No. 46, statement No. 49. No, that is not right. It should be $6,398.18, I think.

Q. Please give me the items that you use to obtain that result.

A. Exchange on draft $12.50; interest on ninety-two thousand seven per cent. bonds $3,220, less Government taxes $96.60, leaves $3,123.40 United States tax on, and then there is added United States tax again three per cent. on $3,220, withheld from bond-
1608 holders $96.60; interest on bonds $50.68; interest on eighty-nine thousand bonds at seven per cent. $3,115.

Q. That use twice there of $96.60, one cancels the other virtually does it not, and makes the total payment of interest $3,320. The interest paid was $3,220.

A. $3,220. is the total payment of interest, yes sir.

Q. Now, eliminating the use twice of the $96.60, what do you get the total amount of interest paid?

A. $6,398.18.

Q. Now, the secretary in his printed report for that year makes the amount paid $6,371.43, being $26.75 less than you make it.

A. I do not see any explanation of that here.

Q. Well, we will not stop to figure out the explanation of that. If you please we will take the Government tax on receipts and machine shop, $19,372.26, State and county tax, $6,917.10, and interest and exchange $6,371,43, using for the last item the secretary's figures, please give the aggregate of those items.

A. $32,660.79.

Q. Please take that last amount from $540,626.67, being the difference between the gross transportation receipts and the operating expenditures as shown by Exhibit 32, and give me the remainder.

A. $507,965.88.

Q. That leaves that net amount of transportation earnings for that year, left after the payment of operating expenses, taxes, interest and exchange, does it?

A. Yes sir.

Q. Were there not other expenditures made that year?

1609 A. Yes sir.

Q. How much for new locomotives?

A. $102,741.90.

Q. How much for new passenger cars?

A. $10,930.33.

Q. How much for new baggage and freight cars?

A. $34,979.58.

Q. How much for new buildings?

A. $4,863.38.

Q. How much for rebuilding bridges?

A. $6,742.80.

Q. What was paid on account of subscription to the volunteer fund?

A. One thousand dollars.

Q. What on account od donation to State Fair grounds?

A. $224.40.

Q. What is the aggregate of the items you have given me for locomotives, passenger cars, baggage and freight cars, new buildings, rebuilding bridges, subscription to the volunteer fund and donation to the State Fair grounds?

A. $161,482.39.

Q. Now, please deduct that amount you have just given me from the balance you had left after deducting taxes, interest and exchange from net transportation earnings, that balance being $507,965.88, and give me the remainder.

A. $346,483.49.

Q. That agrees with the secretary's report does it not, except as to one cent.

A. Yes sir.

Q. That we found up in the Government tax on receipts.

1610 A. Yes sir.

Q. Please take Exhibit No. 33, being itemized transportation account for the year ending November 30, 1865, and give me the gross receipts as shown by that exhibit for that year?

A. $1,248,725.88.

Q. What were the expenditures for operating expenses that year?
A. $615,656.96.
Q. Deducting those operating expenses from the gross receipts what do you get?
A. $633,068.92.
Q. What amount was paid for taxes during that year?
A. State and county taxes, do you mean?
Q. And Government, all.
A. State and county $26,602.65.
Q. Now, the Government tax?
A. $40,423.68.

By Mr. KETCHAM:

Q. Does that include the tax on dividends?
A. No sir.

By Mr. WILLIAMS:

Q. That is exclusive of the dividend tax entirely, is it?
A. Yes sir.
Q. What amount was paid out that year for interest and exchange?
A. $5,638.51.

1611 Q. The secretary's statement for that year shows amount paid for interest and exchange to have been $5,038.26, being $600.25 less than the amount you have just given me. I will ask you if the explanation for that discrepancy is not found, in Exhibit 46 and consists of the following items: For interest on twenty bonds converted, $350; for interest on one bond surrendered, $17.50; for interest on bonds surrendered, $232.75; those three items I have just given you make $600.25, do they not?
A. Yes sir, that is for interest received on bonds surrendered, and operates as credit on the payments which I gave, and leaves the balance, the net balance $5,038.26.
Q. As the secretary has it?
A. Yes sir. I might as well state here that the discrepancy of $26.05 in the next preceding year is explained in the same way.
Q. In other words, the treasurer debits the interest account with the full amount of interest on the bonds, and then credit- that account with the interest that he got back from the bondholder upon the surrender of the bonds, as it were?
A. Yes sir, that is the way it was done, I suppose.
Q. And the net amount is represented between the full interest the bonds bore and the amount that he got credit for on the surrender of the bonds?
A. Yes sir, that is right.
Q. Now, what is the aggregate amount of taxes, interest and exchange paid that year? Have you the figures there before you?
A. $40,423.68—is that it?—And $26,602.65.

1612 Q. And the $5,038.26.
A. The total of those three items is $72,064.69.

Q. Please deduct the aggregate of taxes, interest and exchange, as you have just given it from the difference between gross transportation receipts and operating expenses which was stated just now to be $633,068.92, and give me the balance.

A. $561,004.33.

Q. What additional expenditures were made that year beyond taxes and interest and operating expenses; how much for new locomotives?

A. $43,455.

Q. How much for new freight cars?

A. $97,424.54.

Q. How much for new passenger cars?

A. $20,352.

Q. How much for new buildings?

A. $13,368.14.

Q. How much for rebuilding bridges?

A. $36,006.01.

Q. How much for rebuilding carpenter shop destroyed by fire in part?

A. That item does not appear in my statement.

Q. Have you any charge that year for loss of material by a fire?

A. Not in Exhibit No. 50.

Q. Have you in any other exhibit?

A. I am looking to see. The loss of material by fire in the carpenter shop was charged directly to profit and loss account and appears on Exhibit 48.

Q. In what sum?

A. $5,899.94. It is entered not as an expenditure but as a loss.

1613 Q. It was taken out of profit and loss?

A. Yes sir; the loss of the carpenter's shop is charged to surplus account November 30, 1865.

Q. What is the entry there?

A. It is surplus debtor to loss and damage, $7,815.60. It is not entered as an expenditure, but a loss of property.

Q. In the secretary's report for that year he shows that item of $7,815.60 as being for rebuilding carpenter shop destroyed by fire in part, does he not?

A. Yes sir, let me look at that entry a moment (referring) "Carpenter shop building in part." That is what the entry is, yes sir.

Q. The entry on the journal, are you reading from?

A. On the journal, yes sir.

Q. Just read the entry as it is.

A. "Surplus account, debtor to sundries." Amongst the sundries, loss and D. carpenter shop building in part, $7,815.60.

Q. "Loss and D." means loss and damage account does it not?

A. Yes sir, the loss and damage account.

By Mr. KETCHAM:

Q. That is journal what?

A. Journal C, page 423.

By Mr. WILLIAMS:

Q. What amount was paid that year for subscription to volunteer fund?

1614 A. $5,000.

Q. Have you those items that we have just gone over, so that you can add them up?

A. Call me them, please; I am not sure that I have them all.

Q. New locomotives, $43,455; new freight cars, $97,424.54; new passenger cars, $20,352; new buildings, $13,383.14; rebuilding bridges. $36,006.01; rebuilding carpenter shop, $7,815.60; loss of material by fire, $5,899.94; subscription to volunteer fund, $5,000. That is all. How much do they aggregate?

A. $209,336.23.

Q. Is it not $229 thousand instead of $209 thousand?

A. $229,336.23.

Q. Then the correct amount of the aggregate of those items is $229,336.23?

A. Yes sir.

Q. Now will you please deduct that amount from $561,004.33, which you gave me just now as the difference between the net transportation receipts and the aggregate of the taxes, interest and exchange?

A. $331,668.10.

Q. This last amount you gave me represents, does it not, the balance of transportation earnings for that year after deducting operating expenses, taxes, interest and exchange and the items of additional expenditure that I have given you?

A. Yes sir.

Q. Permit me to call your attention to the secretary's statement No. 2 on page 11 of the report for 1865.

A. Yes sir.

Q. What is that heading?

1615 A. "Statement No. 2. Income account."

Q. Now, I want to call your attention to the second heading there.

A. The second heading on the book is, "Aggregate receipts," evidently a mistake.

Q. It means aggregate expenditures, does it not?

A. Yes sir.

Q. And under that head of aggregate expenditures there appear all of these items for taxes, equipment, new buildings, bridges, carpenter shop loss of material and subscription to volunteer fund.

A. They are all there, yes sir.

Q. Please turn to Exhibit No. 34, being itemized transportation account for the year ending November 30, 1866 and give me the amount of gross transportation receipts as shown by that exhibit for that year.

A. $1,049,720.28.

Q. What were the operating expenses that year?
A. $616,115.66.
Q. The footing of your exhibit shows more operating expenses than that, does it not?
A. There is included in the footing of my exhibit $22,983.76
Q. For what?
A. For internal revenue tax; but in a note below I deduct that, leaving the $616,115 66 with the secretary's distribution.
Q. That is, in your note you have distributed it as the secretary distributes it in his report?
A. Yes sir.

By Mr. KETCHAM:

Q. On what page does that appear?
1616 A. The note is on page 3.
Q. The total of the operating expenditures figured up $616,115.66. The note shows that $22,983.76 is deducted from the total, $639,099.42. It must therefore appear——
A. The first debit item. It never was called an operating expense.

Mr. KETCHAM: Oh, yes, I see.

By Mr. WILLIAMS:

Q. Now, taking the gross operating expenses exclusive of the Government tax from the gross receipts as shown by that exhibit, and what balance do you get?
A. $433,604.62
Q. What taxes were paid that year?
A. Government tax? $22,983.76, and $4,187.80, Government tax, too, making $27,171.56; State and county taxes, $7,435.75.
Q. What was paid for interest and exchange?
A. $2,186.50, less $168.50, credits, net $2,018.
Q. What was that credit, Mr. Duy? You had better explain it while we are here.
A. There is a credit for "Coupons paid at this office, charged to the treasurer on the books of the Farmers' Loan and Trust Company," three credits of that kind, $33.25, $66.50, and $66.50. It appears to have taken off a credit on the second note, English & Morris, $2.25. I don't know why that is taken off.
Q. But those four items made up the difference?
A. Those four items make the difference.
1617 Q. How are they credited on the——
A. They went to the credit of interest account.
Q. That year?
A. Yes sir.
Q. Now please give me the aggregate of taxes and interest paid that year, taking the net interest as you just gave it last.
A. $36,625.31.
Q. Now please deduct that last amount from the difference be-

tween transportation receipts and transportation expenses stated just now as being $433,604.62, and give me the balance.

A. $396,979.31.

Q. What additional expenditures were made that year for new buildings?

A. $2,814.05.

Q. What for new baggage and freight cars?

A. $9,891.60.

Q. What for rebuilding bridges?

A. $55,527.22.

Q. What for rebuilding telegraph line?

A. $2,300.

Q. What for completing the rebuilding of carpenter shop that was destroyed by fire in 1865?

A. That item is $6,303.06, charged to surplus account, entry, Journal C, page 600, and appears on Exhibit No. 47.

Q. What for the extension of the union depot at Indianapolis?

A. $13,000.

Q. What for real estate for depot grounds?

A. $14,000.

1618 Q. What for donation to State fair grounds?

A. $204.60.

Q. Now, have you the items there which you have just given me, tabulated, so that you can add them up, beginning with new buildings and ending with donation to the State fair grounds?

A. Eight items I have.

Q. Yes sir, eight items. Give me the aggregate of them, please.

A. $104,040.53

Q. Please deduct that last amount from the balance we have left after taking taxes and interest from the net transportation earnings, being as heretofore stated, $396,979.31 and give me the remainder.

A. $292,938.78

Q. Please take Exhibit No. 35, being itemized transportation account for the year ending November 30, 1867, and give me the total amount of transportation receipts as shown by that exhibit to that year.

A. $1,075,513.55

Q. What were the operating expenses for that year as shown by that exhibit?

A. $577,395.13.

Q. Does that agree with the statement of the secretary for that year as printed?

A. It does not.

Q. What is the difference?

A. $66,935. The secretary's is that much more than the statement.

Q. What items go to make up that difference?

A. If you will give me that consolidation (referring to Exhibit No. 20).

1619 On page 114 of Journal D, there is an entry charging surplus and crediting C. Rose, trustee, for difference between the cost and present value of the company's stock held by him, $65,935; and on page 113, is an entry charging surplus account with the donation to Vigo County Agricultural Society of $1,000. These two items aggregate $66,935, and make the difference between our statement of operating expenses as they appear in such items as were heretofore charged to operating expenses and the secretary's statement in his printed report.

Q. The secretary then, so far as this printed report is concerned, included in his statement of operating expenses a profit and loss item, and a donation to the Vigo County Agricultural Society?

A. Yes sir.

Q. And the books to that extent disagree with the printed statement of the secretary?

A. Yes sir.

Q. Who was the secretary that year, Mr. Duy?

A. Richard A. Morris.

Q. Who had been the secretary for all the years previous?

A. Mr. Charles Wood, I think.

Q. You will find there, don't you, that Mr. Morris signed the report for 1866 as secretary?

A. That is what I was looking for, yes sir. Mr. Wood was secretary before that.

By Mr. HAWKINS:

Q. Up to eighteen sixty what?

A. Eighteen hundred and sixty blank.

1620 By Mr. WILLIAMS:

Q. Up until 1866, was it not, Mr. Duy?

A. Yes sir; I was looking to see the time his death was reported.

Q. Please turn to page 6 of the report of the president for the year ending November 30, 1866, and note the second paragraph there from the bottom of the page.

A. Yes sir.

Q. What does it say?

A. It announces the death of Mr. Charles Wood, who was the only secretary and general ticket agent in this company until his decease.

By Mr. KETCHAM:

Q. He dies in 1866, the report shows?

Mr. WILLIAMS: Yes sir, the report of that year notes his death. He died in 1866.

A. Mr. Morris signed that report as secretary for the year 1866.

By Mr. WILLIAMS:

Q. And that was the first one he did sign?

A. Yes sir.

Q. What balance remained after deducting the operating expenses for the year 1867 from the gross receipts for that year as shown by your exhibit?

A. $498,118.42.

1621 Q. What taxes were paid that year?

A. Internal revenue, $18,328.37; State and county, $18,439.33; total $36,767.70.

Q. There was no interest paid that year, was there, Mr. Duy?

A. No sir.

Q. Now, please deduct the amount of Government tax and State and county tax which you have just given me, from the balance of transportation earnings and give me the balance.

A. $461,350.72.

Q. What expenditures were made that year for new buildings?

A. $7,250.22

Q. What for union depot extension at Indianapolis?

A. $5,500.

Q. What for rebuilding bridges?

A. $4,830.26.

Q. What for new freight cars?

A. $23,827.54.

Q. What for new water stations?

A. $7,928.69.

Q. What for turn table at Greencastle?

A. $1,999.20.

Q. What for real estate, for depot grounds?

A. $399.37.

Q. All of those items agree with the secretary's report, do they not, Mr. Duy?

A. Yes sir, they all agree.

Q. The only difference then between you and the secretary for that year grows out of the charge to operating expenses of

1622 the items that had gone to profit and loss and to surplus on the books?

A. That is right.

Q. What is the aggregate of those items that I have just given you, beginning with new buildings and ending with real estate for depot grounds, seven in all?

A. $51,735.30.

Q. Now, deducting that amount, you have just given, from the balance left, after you took the taxes from the net transportation earnings, then give me the result.

A. $409,615.42.

Q. The charging of that sixty six thousand dollar item by the secretary to operating expenses in his printed statement in no ways disturbed the general ledger balance, did it?

A. No sir; I don't know; I suppose not. No, it would not affect it in any way at all.

Whereupon, the hour of twelve o'clock and thirty minutes having arrived the further hearing was adjourned until two o'clock and thirty minutes p. m.

1623 TWO O'CLOCK P. M.

The parties met pursuant to adjournment.

Present: The same as heretofore, with the exception of Judge S. Taylor, of counsel for plaintiff, and Lawrence Maxwell, Esq., of counsel for defendant.

The cross-examination of the witness, GEORGE C. DUY, was resumed as follows:

By Mr. WILLIAMS:

Q. Mr. Duy, please to take Exhibit No. 36, being itemized transportation account for the year ending November 30, 1868, and give me the total gross receipts from transportation as shown by that exhibit for that year.

A. $1,095,005.97.

Q. What were the operating expenses that year?

A. $590,587.08.

Q. Deducting the operating expenses from the receipts what balance do you get?

A. $504,418.89.

Q. What taxes were paid that year? Whilst right there, Mr. Duy, on what one of your exhibits were the taxes shown?

A. In 1868, on Exhibit 50.

Q. Do all the taxes appear on that exhibit?

A. No, I think not. I confined it I think.

Q. Some of them in the surplus account, the itemized surplus?

1624 A. Well, this revenue tax is partially on this transportation account. Which do you want now?

Q. Neither. I just wanted to know if there was any one exhibit where you showed them.

A. No, I think not.

Q. Now, give me the tax paid in 1868, Government as well as State and county taxes.

A. Government tax, $16,133.24, and State and county, $17,453.11, making $33,586.35.

Q. Your amount for State and county taxes agrees with the secretary's report, but for Government tax he gives more than you do; he gives $19,680.80. You notice that a part of the Government tax is embraced in your exhibit and included in the transportation expense?

A. Yes sir, I have that.

Q. $11,408.59?

A. Yes sir, eleven thousand dollars.

Q. Now, there must be some eight thousand dollars more paid,

Don't you find it on page 7 of Exhibit 47, being your itemized surplus account?

A. That is what I was looking at.

Q. "United States internal revenue tax, five per cent. on $174,913.75; surplus for year ending November 30, $8,745.70." That is on page 7 of Exhibit 47.

A. That does not agree with his statement.

Q. No, it makes it too much, if you add it all.

A. Then there is another item of forty-seven hundred.

By Mr. KETCHAM:

Q. What does the secretary state it at, Mr. Duy?

A. $19,680.80.

1625 By Mr. WILLIAMS:

Q. Don't you find that difference on page 7 of your itemized surplus account, being Exhibit 47, in three items, which are given as a credit, those three items being: Government tax on St. Louis, Vandalia & Terre Haute railroad bonds, interest, $3.50; Cincinnati & Indianapolis railroad bonds, interest, $100.75 and E. & C. R. R. extension, interest, $369.25; will not those three items make up the difference within one cent? He says those amounts are for deductions made from surplus on the year's business, subject to Government tax, the same having been paid by the companies issuing the bonds.

Mr. KETCHAM: But these are not credits; they are charges.

The WITNESS: They are credits to surplus account.

Mr. CLELAND: I guess that is the cent we lost the other day.

The WITNESS: Yes.

Q. Those items account for the difference, do they not?

A. Yes sir.

Q. What then should be the proper amount of Government taxes?

A. $19,680.79.

Q. And what were the State, county and municipal taxes that year?

1626 A. $17,453.11.

Q. Now, please give the aggregate of the taxes.

A. $37,133.90.

Q. Deduct that amount, please, from the balance you have left after taking operating expenses from transportation receipts and give me the result.

A. $467,284.99.

Mr. KETCHAM: Before you leave that, Mr. Williams, I want to get a little more of an understanding about this than I have, about these Government taxes.

Mr. WILLIAMS: All right, sir.

By Mr. KETCHAM:

Q. Now, the Government tax was what? How do you get at this $19,680.79?

A. Why, there is the charge to transportation of $11,408.59; you add to that $8,745.70, charged to taxes.

Q. What does that come from?

A. It comes from Exhibit 47, page 7.

Mr. WILLIAMS: Being the tax on surplus, Mr. Ketcham.

Q. Yes, that is the tax on surplus, $11,408.59, that comes from Exhibit 50?

A. Yes sir.

Q. What do you make the three items foot up?

1627 Mr. WILLIAMS: The secretary has made a mistake there in footing up, that is evident. It is fifty cents they foot up, instead of forty-nine cents. Those three items are credited back because they were included in the surplus upon which the upper amount of $8,745.70 was paid, but they were actually paid by the holders of those securities and did not come out of the company; the charge was made on the full amount of surplus, and then there is a credit taken for certain items going to make up that surplus upon which the tax was paid by the holders of the securities instead of by the company. The aggregate amount of the four items out of which we took three just now, is $3,021.05.

Q. And you have deducted that from the total tax on surplus of $8,745.70, and got a balance of $4,725.65; but it only takes those three items out of the four to account for the difference of the Government tax between you and the secretary?

The WITNESS: Yes that *us* right.

By Mr. WILLIAMS:

Q. Now, what amount was expended in other ways that year, 1866, say for the North Branch road.

Mr. KETCHAM: Before you get away from that, I want to understand your explanation, as well as have Mr. Duy understand it. I understand you that he takes $8,745.70——

Mr. WILLIAMS: As the total tax on surplus?

1628 Mr. KETCHAM: Then he deducts from that the four items included in this $3,021.05, and in that way gets $4,724.65.

Mr. WILLIAMS: Yes sir, which is the amount carries, the real net amount.

Mr. KETCHAM: But, you take $3,021.05 from $8,745.70, and it leaves $5,724.65, instead of $4,724.65.

Mr. WILLIAMS: That is what it leaves, but that is the way he has got it here, $4,724.65. He has made some mistake. A mistake of $1,000.

The WITNESS: This statement No. 50 is simply a compilation made by us.

Q. You say that statement made by you, upon which the item of $4,724.65 appears, being Exhibit 50, is simply a compilation made by you?

A. Made by us from the books.
Q. Now, how is it that you carried that amount there of $4,724.65 instead of the real difference, between $8,745.70 and $3,021.05?
A. I presume it is a mistake in figuring, a mistake of $1000.
Q. A mistake of $1000 in making that subtraction?
A. Yes sir.

Mr. WILLIAMS: I wish to state, may it please the master, that in my explanation, which Mr. Ketcham wanted explained, I used the expression that the amount of those three credits represented amounts paid by the holders of the securities. That is not what I meant to say.

1629 Those three items represent as shown by this statement on page 7 of Exhibit 47, the amount paid by the companies issuing the bonds in question, those bonds having been previously computed as a part of the surplus upon which the original amount of $8,745.70 was paid.

Q. Now, I will ask you again, what amount was expended in the year 1866 for the North Branch road?
A. $8,517.38.
Q. What amount for new sidings?
A. $20,766.31.
Q. What amount for depot grounds?
A. $326.65
Q. What amount for track scales at Indianapolis?
A. $1,232.18.
Q. What amount for turn table at Terre Haute?
A. I have it at Greencastle.
Q. Terre Haute, first, I have got; there are two; one at Terre Haute and one at Greencastle. Mr. Duy, you have the aggregate of the two items stated in your Exhibit 47; on page 7, you have there "New turn table G. C., $2,342.61."
A. Yes.
Q. That makes the aggregate of the two turn tables, one being charged for Terre Haute, at $1,866.98, and the other at Greencastle for $475.63?
A. I did not see that entry though.
Q. It is journal page 239.
A. It is entered as I have it; new turn table at Greencastle, $2,342.61.

1630 Q. The two items given in the secretary's report of $1,866.98, for a turn table at Terre Haute, and $475.63, for a turn table at Greencastle, make what in the aggregate?
A. $2,342.61.
Q. That makes the item that appears in your exhibit, does it not, as the Greencastle turn table?
A. Yes sir, it makes the amount.
Q. What amount was expended that year for new buildings?
A. $6,325.76.

Q. Ought you not to add to that an item of $1,878.05 for a new engine house at Terre Haute?

A. It is entered on the journal separately.

Q. Yes, but just please add it, and give the aggregate amount.

A. $8,203.81.

Q. Can you give me the aggregate now of the seven items that we have just been considering, or would you prefer to have me call them to you?

A. You can call them and see whether I have got them right.

Q. North Branch road, $8,517.38; new sidings, $20,766.31; depot grounds, $326.65; track scales, $1,232.18; turn table, $2,342.61; new buildings $8,203.81. Those are all.

A. $41,388.94.

Q. Now, what was spent for new locomotives that year?

A. $10,000.

Q. What for new freight cars?

A. $71,877.16.

Q. What do those two items amount to in the aggregate?

A. $81,877.16

1631 Q. Now, will you please add that last amount to the aggregate of the seven items you gave me just before, and deduct the sum of the two items from the balance you had left after taking taxes from net transportation earnings, being a balance of $467,284.99.

A. $344,018.89.

Q. Please turn to Exhibit 37, being itemized transportation account for the year ending November 30, 1869, and give me the amount of gross receipts as shown by that exhibit for that year?

A. $1,190,869.87.

Q. Does that not include something in addition to the receipts, or outside of the receipts from passenger, freight, mail and express service?

A. Car service.

Q. How much?

A. $10,872.04.

Q. Where did that come from?

A. It came from an account on the ledger.

Q. Called car service account?

A. Yes sir, car service account. This is balance transferred.

Q. And can you tell us what that account represented from your examination of the journal?

A. Why, the collections for service of cars from other roads.

Q. Mileage was it?

A. Service of cars on other roads, was it not?

Q. I say, was it mileage?

A. Mileage, yes sir.

1632 Q. And this was a balance to the credit of the company that year after taking out what we were entitled to receive from other roads and paying what we were called upon to pay other roads for service on our line?

A. I suppose so, without looking; I have forgotten.
Q. Well, it is set out in your exhibit there.
A. Yes sir, it is balance of account standing to the credit of mileage.
Q. Now, what were the operating expenses for the year 1869?
A. $593,112.41.
Q. Deducting that amount from the gross receipts as heretofore given, what balance have you as the net transportation earnings for that year?
A. $597,757.46.
Q. What was the amount of taxes paid that year?
A. Government tax, $14,485.50; State and county tax, $15,626.18.
Q. What do those two items amount to?
A. $30,111.68.
Q. Deduct that please, from the net transportation earnings and give me the balance.
A. $567,645.78.
Q. Was there anything paid that year on account of interest?
A. I do not see anything.
Q. Is there anything charged that year for discount on bonds?
A. Yes sir, $34,300.
Q. On what one of the exhibits does that appear?
A. It appears on Exhibit 47, page 8.
Q. That exhibit is your itemized surplus account?
A. Yes sir.
1633 Q. And that discount is charged against surplus is it?
A. Yes, sir.
Q. Can you tell us something about that charge, something more definite than the mere statement of its being discount on bonds; do the books show any explanation of it?
A. That item is transferred from discount account, Ledger C, page 374. That account is made up of three items. First, is Journal D, page 341, October 19, 1869, discount account debtor to bond account, for discount on two hundred and seven bonds, amounting to $207,000, at ten per cent., $20,700 On page 350, date November 30, 1869, discount account debtor to bond account for discount on one hundred and twenty bonds, at a thousand dollars each, amount to $120,000. at ten per cent. off, $12,000; and on ten bonds at $1,000. each, amounting to ten thousand dollars, at five per cent. off $500, making $12,500. And on page 363, discount account to bond account, for discount on eleven bonds, of one hundred thousand dollars each, amounting to $11,000, at ten per cent. off, $1100. making a total of $34,300. transferred to surplus account November 30, 1869.
Q. Surplus account was then debited with that amount by the transfer?
A. Yes sir.
Q. What bonds are referred to in those entries, do you know?
A. New issue of bonds made in 1869. I suppose thay are the ones.

1634 Q. Do the books show that there was a new issue that year? The same account is credited with the proceeds of them, is it not?

A. Yes sir. Bond account is opened on Ledger C, page 4, and the title of that account is "Bond account, seven per cent. Ten year loan, July 1, 1869."

Q. And what are the entries in that account?

A. October 19, 1869, it is credited with $207,000; November 20, 1869, it is credited with $130,000; December 20, 1869, it is credited with $11,000; 1870, February 4, it is credited with $128,000; February 8, 1870, it is credited with $24,000; March 5, 1870, it is credited with $25.000; March 7, 1870, it is credited with $100,000; March 11, 1870, it is credited with $25,000; March 18, 1870, it is credited with $50,000; March 28, 1870, it is credited with $100,000; making a total of $800,000; and that is carried to the next ledger.

Q. There were $800,000 issued then at what date there—what is the last date?

A. The last date is March 28, 1870. The first three items in that account are the same as those upon which the discount of $34,300 was charged on.

Q. Now, those entries relating to this discount and bonds taken together, indicate that a portion of those sold in 1869 were sold at a discount of ten per cent. and that 10,000 of the amount was sold at a discount of five per cent.

A. Yes sir.

1635 Q. How much was expended in 1869 for Branch road? Your Exhibit 47. on page 8, show- quite a number of items that relate to the question. You might give them all to me in the aggregate

A. That is what I am figuring now. $100,298.82.

Q. What was spent for new sidings?

A. $22,396.46.

Q. What for depot grounds?

A. $28,660.

Q. There is a difference there of $125.

A. That was spent for the stone quarry.

Q. What was spent for engine houses?

A. $16,589.09, and $127.76, engine house at Brazil.

Q. What does that make in the aggregate for the engine houses?

A. $18,003.11.

Q. Oh no, Mr. Duy, it is only $127.76 added to $16,589.09.

A. $16,716.85.

Q. What was spent for new car house and tracks at Terre Haute?

A. $17.875.35.

Q. What was spent on account of the new machine shop at Terre Haute?

A. $1,477.87.

Q. What was spent for new locomotives?

A. $23,500.

Q. What for new freight cars?

A. $67,247.52.

Q. Now, will you please give me the aggregate of the expenditures for branch roads, sidings, depot grounds, engine houses, stone quarry, new car house and tracks, new machine shop
1636 at Terre Haute, new locomotives and new freight cars?

A. $278,297.87.

Q. Now, deducting that last amount you gave me, from the net transportation earnings, after deducting taxes, give me the balance, please.

A. $289,347.91.

Q. In adding up the items the aggregate amount of which you last deducted, you did not include that discount, did you?

A. No sir.

Q. Please take Exhibit 38, being itemized transportation account for the year ending November 30, 1870, and give me the total receipts as shown by that exhibit for that year.

A. $1,087,526.49.

Q. In that amount is included a receipt from car service is there not, just as there was in the previous years?

A. Yes sir.

Q. What were the operating expenses that year?

A. $628,061.44.

Q. Deducting that from the gross receipts what balance have you?

A. $459,465.05.

Q. What taxes were paid that year, 1870?

A. Revenue tax, $10,303.18.

Q. State, county and municipal tax, what?

A. $15,721.99.

Q. Making an aggregate of taxes of what?

A. $26,025.17.

Q. What amount was paid that year in the way of interest on bonds?

1637 A. $52,500.

Q. What other interest was paid that year?

A. Interest on "loans, and so forth," $7,460.82, and exchange and discount, $3,892.73, and a balance of discount account on bond transferred to interest account $30,160, making a total debit of interest $94,013.55. And there are credited, "notes, loans, and so forth," $3,454.48, company bonds, $334.22.

Q. All of these items you have given me you have taken from interest account, haven't you?

A. Yes sir, Exhibit 46.

Q. Now, where do you get, from the items on that exhibit, the sum of $3,454.48?

A. That is the credits on notes, loans and so forth account, footed up here.

Q. What items did you use to make your footings?

A. That is just a little recapitulation in a note. We will have to go over the items to make it up.

Q. I think you will have to do that, because there is 35 cents of an error there.

(Mr. Duy called the items, and they footed up $3,454.48.)

Q. I will call your attention to the fact that in the secretary's report for 1870, his statement B, he gives the interest and discount, as $90,224.85.

A. Yes.

Q. And that is the amount which you give as the balance of surplus account transferred, less $334.22?

A. $90,224.85.

Q. Being the exact amount that you give as balance of
1638 surplus transferred?

A. Yes.

Q. Now, can you tell us if that will be a right statement of the interest and discount paid that year?

A. That would be all right if you include the interest on notes, loans, and so forth as paid without any credit, and on exchange and discount, as well as the interest and discount on the company bonds.

Q. Now, let us get it in a little clearer shape, please.

A. Yes sir.

Q. The total amount of interest paid and the balance of discount transferred amounted to $94,013.55, did it not?

A. Yes sir.

Q. So that the amount of interest paid, not taking into account any credits for interest received, would be the difference between $94,013.55 and the discount balance of $30,160?

A. The $30,160 was all the discount that year.

Q. Now, if you take that from $94,013.55 it will leave you the real interest paid including that item of interest and exchange in the November expenditure?

A. Well, that should be exchange and discount, including the item of exchange and discount.

Q. How much is that item?

A. $3,892.73. That is on New York exchange, backwards and forwards.

Q. Where is it?

A. It is in the recapitulation.

Mr. KETCHAM: It is the third item he gave, $3,892.73.

1639 Q. That is made up of a lot of minor items?

A. Yes, sir, that is the aggregate.

Q. Now, does it include that first item on your debit side of surplus? "Note, National State bank, at sixty days, for $30."

A. Yes; on the debit side, yes.

Q. That is not indicated on the face of the exhibit as discount?

A. Well, it is discount, or interest; it is interest on a note.

Q. It is interest taken out in advance I suppose?

A. I presume so.

Q. Well, it is interest on the note?

A. Yes sir; you might just as well call it interest and exchange as exchange and discount; it is the same thing exactly.

Q. It means the same thing?

A. It is the same thing.

Q. Then there was interest, using that term as interchangeable with exchange and discount, or meaning the same thing, including them in it there was paid in interest in that way the difference between $94,013.55 and $30,160.

A. Yes sir.

Q. Which would be what, please?

A. $63,853.55.

Q. Now, should that gross amount of interest paid be credited with anything?

A. Be credited with the two items, notes, loans and discount, notes loans -c. $3,454.48, and interest on company bonds $334.22.

1640 Q. Making a total of what? Those two items make a total of what? Those two items of credit?

A. $3,788.70.

Q. Now, will you please deduct that item of credit from the gross amount of interest paid and give me the net amount paid that year for interest?

A. $60,064.85.

Q. Now, if to that net amount of interest paid that year of $60,064.85 you add the item of discount of $30,160, it will give you, will it not, $90,224.85, being the amount shown by the secretary's report for interest and discount.

A. That is right. That is what is gives.

Q. Now what was that discount, $30,160? Was that discount on bonds?

A. That is discount on bonds, on the company bonds.

Q. Like the same item we had in a previous year?

A. Yes sir.

Q. We had a moment ago as taxes paid for the year 1870, $26,025.17.

A. Yes.

Q. Now please add to that the net interest payment that year of $60,064.85 and take the aggregate of those two items from the balance of net transportation earnings stated at $459,465.05.

A. $373,375.23.

Q. What have you for the net transportation balance?

A. $459,465.05.

Q. And what have you for the aggregate of taxes and interest?

A. $86,090.02. $373,375.03 is the balance.

Q. That is what we have it, and that amount that you
1641 gave last represents the balance remaining of the transportation earnings after deducting taxes and interest.

A. Yes.

Q. Now what was paid during the year 1870 for branch road-?

A. There was charged for that year to branch roads $18,416.22.

Q. How do you get that?

A. In addition to that there is a charge to surplus of, South Branch road $51,651.33, but it is credited right back again, $51,651.33.

Q. And the net amount then for 1870 expended on branch roads is $18,416.22.

A. According to the statement that is the net amount, yes.

Q. According to your exhibit, is it not?

A. No, my exhibit has—Exhibit 50 has that additional item of $51,651.33. That is credited to South branch and charged to surplus on the last day of the year; on the next day it is charged to the branch and credited to surplus again.

Q. Well, the entries just cancel each other don't they?

A. Well, one is made one day and one the next, and on the ledger it appears on the debit side of South Branch road that year.

Q. In your itemized surplus account, as it appears in Exhibit 47, that surplus account on page 9 of that exhibit is debited with South Branch construction $51,651.33, and on page 8 of the same exhibit surplus is credited with South Branch construction for ex-

1642 actly the same amount.

A. That is what I say. South Branch construction is debited along during the year with sums amounting to that $51,651.33. By a journal entry on page 553, under date of November 30, South Branch construction is credited with that and it is charged to surplus account, and that closes the account.

Mr. WINTER: It shows that much expended during the year.

The WITNESS: That closes the account of 1870, that is, for the fiscal year 1870; but on page 552 of the journal under date of November 30, at the head of the page but posted on the ledger December 1st, it is charged back to South Branch construction, opening a new account, and is credited to surplus account.

Q. It appears then from the books, does it, that there was during the year 1870 $51,651.33 expended on account of South Branch construction?

A. Yes sir, and charged to that account. You will find that included in the next year.

Q. I know, I understand that. Now, does that South Branch item, and the one you gave me just now of $18,416.22, constitute all the expenditures for branch roads for 1870, as shown by your exhibits?

A. Yes sir, as shown by my Exhibit No. 50.

Q. And that Exhibit No. 50 shows all the expenditures that were made, does it, for branch roads?

A. It was intended to, yes sir.

Q. Now, what was spent in the year 1870 for new sidings?

1643 A. $12,660.05.

Q. How much for real estate?

A. $7,345.10.

Q. What for new engine house and tracks at Brazil?

A. $3,905.70.

Q. What for new engine house and tracks at Terre Haute?
A. $27,763.34.
Q. What for new engine house and tracks at Indianapolis?
A. $32,829.64.
Q. What for new water stations?
A. $9,769.20.
Q. What for new buildings?
A. $13,593.30.
Q. What for new machinery at the Terre Haute shops?
A. $720.65.
Q. In the secretary's report, statement B, for the year 1870, there appears under the head of expenditures an item of $6,138.50, designated "Increase in supplies on hand." Have you in your exhibit a statement of that, or explanation of it.
A. No sir, I think not.
Q. You would have some trace of that on some of your exhibits would you not, naturally, if you went all through the books?
A. I do not know how to find it. It is something I suppose connected with the machine shop material, and we did not have the machine shop books, or any explanation of them.
Q. Now, please give me the aggregate of the following items which you have already stated in answer to my inquiries: Branch roads $18,416.22; branch roads $51,651.33; new sidings $12,660.05; real estate $7,345.10; new engine house and tracks at
1644 Brazil $3,905.70; new engine house and tracks at Terre Haute $27,763.34; new engine house and tracks at Indianapolis $32,829.64; new water stations $9,769.20; new buildings $13,593.30; new machinery $720.65; give me the aggregate of those please?
A. $178,654.53.
Q. Now, deducting that last amount you gave me from the balance we have left after taking taxes and interest out of net transportation earnings, that balance being $373,375.03
A. $194,720.50.
Q. That is the balance left of the transportation earnings as given on Exhibit 38 after deducting operating expenses, interest and taxes, and those items, as we stated them, of additional expenditures.
A. Yes sir.
Q. Please take Exhibit 39, showing transportation account for the year ending November 30, 1871, and give me the total receipts as stated in that exhibit for that year?
A. $1,002,720.74
Q. That includes one item that does not usually appear in transportation receipts, does it not—track rents.
A. Yes sir, track rents.
Q. Balance transferred $5,969.06.
A. Yes sir.
Q. That balance of track rent goes to make up in part the total gross receipts that you gave me just now?
A. Yes sir.

1645 Q. Please take the secretary's report for the year 1871.
A. I have it.

Q. You find that the total transportation receipts given by him are the same as those given by you, do you not?

A. Yes sir.

Q. But in his statement of transportation receipts he has as a last item, $49,816.68 as coming from other sources, sources other than passengers, freight, coal, express or United States mail.

A. Yes.

Q. Now the other sources as given in your exhibit are: Car service, balance transferred, $42,544.24; Illinois Central current military account, $675.88, and track rent, balance transferred, $5969.06. Now those items only amount to $49,189.18. The secretary gives it $49,816.68. Can you tell us anything about that discrepancy?

Mr. KETCHAM: $627.50 is the difference.

Q. Here is an item of $627.25, express and news. That does not account for it?

A. I can guess at it. I cannot see now to figure it, but I think the difference is made up by the news, the rent of the news privilege. Those two items are express and news put together. I think they ought to be divided. That is my guess about it.

Mr. WILLIAMS: There are a half dozen of those items in there and the secretary has separated and taken the news revenue, that is the revenue from the news company, as being other than transportation earnings.

1646 Mr. KETCHAM: What is the aggregate of express?
The WITNESS: $923.04.

Q. What were the operating expenses for that year, Mr. Duy?

A. $591,787.63.

Q. Leaving a balance of what amount after deducting the operating expenses from the transportation earnings as given in the exhibit?

A. $410,933.11. I do not think I can do this very profitably or satisfactorily any longer. I cannot see. I am sorry to inconvenience anybody.

Whereupon, the hour of four o'clock and forty-five minutes having arrived, the further hearing was continued until tomorrow, Tuesday, October 17, 1899, at ten o'clock a. m.

1647 TUESDAY, *October* 17, 1899—ten o'clock a. m.

The parties met pursuant to adjournment.
Present the same as on yesterday.

The cross-examination of the witness, GEORGE C. DUY, was resumed as follows:

Questions by Mr. WILLIAMS:

Q. Mr. Duy, just before we adjourned last evening, you gave me as the difference between gross receipts and operating expenses as shown by Exhibit 39, $410,933.11. What taxes were paid that year?

A. Revenue, $599.25. State and county, $14,680.74.

Q. Making a total tax of what?

A. $15,277.99

Q. Seventy-nine—two seventy-nine, it must be?

A. $15,279.99

Q. What was paid that year,—we are now on the year 1871, for interest and exchange?

A. I have $12,595.78.

Q. That is not all of it, is it, Mr. Duy?

A. Well that is what I call interest and exchange. Interest on notes, loans and accounts $6,691.78

Mr. WINTER: Is that an additional amount?

The WITNESS: Yes sir.

A. (Continuing:) These together make $19,287.56; credits, $5.420.23; leaving a balance of $13,867.33. Interest on bonds $56,005.75; making a total interest payment of $69,873.08.

1648 Q. That agrees with the secretary's report, does it?

A. Yes sir.

Q. What was that credit for, Mr. Duy, of five thousand and odd dollars?

A. That was interest received from——

Q. Interest received from various sources?

A. Interest received from various sources, yes sir; interest on deposits in bank and accounts of various kinds,—mostly on bank deposits.

Q. Now Mr. Duy, will you please take the total amounts as you have given them of taxes and interest and deduct the sum of those items from the balance of transportation earnings, $410,933.11, and give us the result.

A. The amount of those items is $85,153.07; deducting from the former balance leaves $325,780.04.

Q. What do your exhibits show to have been expended during the year 1871 on account of the South Branch road?

A. There is an item there of $62,065.51, from which should be deducted $51,651.33 included in last year's expenditures, leaving a balance of $10,414.18.

Q. The secretary in his printed report has South Branch road charged in 1871 with $62,065.71, has he not?

A. Yes.

Q. But on yesterday we found that there had really been expended in 1870 as shown by the individual account for that road on the ledger $51,651.33?

A. That is right.

Q. And we put that yesterday in the account for 1870?

A. That is correct.

1649 Q. What amount was expended in 1871, Mr. Duy, for other branch roads?

A. $27,781.24.

Q. What for sidings?

A. $8,165.85.

Q. What for water station?

A. $541.81.

Q. What for buildings?

A. $5,479.85.

Q. What for boiler shop at Terre Haute?

A. $1,698.85.

Q. What for Westinghouse air brakes?

A. $10,160.20.

Q. What for new machinery?

A. New machinery and new frame table, I think it is—traverse table, $1,286.28.

Q. What for real estate?

A. $2,900; I have that on T. H. & I. extension real estate.

Mr. KETCHAM: Is that included in the other exhibit that you have given?

The WITNESS: I don't know.

Mr. KETCHAM: Better find out now.

The WITNESS (examining papers:) It is not in the T. H. & I. extension, construction. $2,900.00 is the balance of account T. H. & I. extension, real estate, and is charged to surplus account.

Q. Mr. Duy, there appears in the secretary's report for 1871 under the head of aggregate expenditures, an item of $37,042.92 for freight cars?

1650 A. Yes sir.

Q. I find in Exhibit 55 that same amount appearing on page 2 of that exhibit, and a note on that same page in which you state that the above balance being a balance of $138,139.83 on account of locomotives and cars is charged to railroad, cost of, November 30, 1872, and forms a part of the alleged entire cost of the road up to that date. It would seem then that that item which the secretary has charged in his statement for 1871 has already been taken into account by us in giving the construction of the road after 1869, does it not?

A. Yes sir.

Q. So that item we should eliminate from the expenditures for 1871. Now, please give me the aggregate, Mr. Duy, of items as you

have stated them, of expenditures made in 1871 for the South Branch road, other branch roads, sidings, water stations, buildings, boiler shop at Terre Haute, Westinghouse air brakes, new machinery and table, and real estate?

A. $68,428.26.

Q. Now please deduct that last amount from the balance that you had after you took interest and taxes from net transportation earnings for that year?

A. The balance is $257,351.78.

Q. Please turn to Exhibit 40, being transportation account for the year ending November 30, 1872, and give me the amount of gross receipts for that year as shown by that exhibit?

A. The gross receipts are $1,074,795.18.

1651 Q. Does that agree with the secretary's report for that year, Mr. Duy? Do you find the secretary's report, Mr. Duy?

A. I will find it directly. There are certain credits to be taken off from that, that appear on our statement $4,440.75.

Q. Seventy-eight, isn't it?

A. Seventy-eight, and that leaves $1,070,354.40, as the transportation receipts for that year. And that agrees with the secretary's statement.

Q. What was the nature of those credits to which you refer?

A. Overcharges and fares refunded.

Q. That embraces them all?

A. Yes sir.

Q. What were the operating expenses that year, Mr. Duy?

A. $727,086.59.

Q. And that deducted from the gross receipts leaves a balance of what?

A. $343,267.81.

Q. Mr. Duy, there was a change that year, was there not, in the system of bookkeeping?

A. Yes sir.

Q. Prior to that time what had been the general heads of accounts that were included in operating expenses?

A. Maintenance of cars, and maintenance of way——

Q. Just look at it a minute, and give them to me as they come. Take Exhibit 39. What were the general heads there included in operating expenses?

A. That year there was running road; repairs of road; repairs of bridges, buildings, &c., repairs of machinery; and general expenses.

1652 Q. Now that same classification had run back through quite a number of years prior to that date, hadn't it?

A. Yes sir.

Q. Now what were the four general heads of operating expense after 1872, as you have given them on Exhibit 40?

A. Conducting transportation. Motive power. Maintenance of way, and maintenance of cars.

Q. And it is only under those four heads that you have given the operating expenses on Exhibit 40?

A. Yes sir.

Q. There is omitted, then, from Exhibit 40, the general head of "General expenses" which was found in Exhibit 39?

A. Yes sir.

Q. Now what were the expenditures under the head of general expenses for the year 1872?

A. The general expense account for that year on the ledger is $97,977.02.

Mr. HAWKINS: Is that the general expense account?

The WITNESS: Yes sir.

Q. That is more than double what the secretary charges under that head in his printed report, is it not?

A. Yes sir.

Q. Well, upon what exhibit of yours do these expenditures appear?

1653 A. They do not appear.

Q. You have taken no account of them?

A. Well I cannot answer that just now. They are not upon that No. 50 that we have been examining.

Q. No sir. Mr. Duy, my attention has just been called to the fact that the ledger footing as given by you just now is exactly $56,000 in excess of the general expense account as returned by the secretary?

A. Yes.

Q. And that that $56,000 appears in the secretary's report for that year as interest on bonds?

A. That is correct.

Q. Will that explain the discrepancy?

A. Of course that amount will probably explain it. There is nothing in the account to explain it. That account is just charged with so much as paid for accounts payable, and nothing on the journal to show what they were.

Q. Is there a $56.000 item in that, or a half of it, $28,000 twice?

A. I think not. (Examin-g books.) There is no such amount as that or half of it. I will just look at the journal.

Q. The interest on these bonds is in April and October; it would probably be charged out in March and September.

Mr. Duy having looked at the ledger and journal, I will ask you to state if you find there an item of $28,000 charged in general expense as the October interest, 1872?

A. Yes sir, transferred from the interest account.

Q. In the search you just made you did not find where the

1654 interest payable in April, 1872 amounting to $28,000 had been transferred to general expense account?

A. No sir.

Q. Will you please look a little further, after we adjourn, Mr.

Duy, and see if you can trace that April payment of interest, in 1872?

A. Yes sir, I will.

Mr. WILLIAMS: For the present we will assume that $56,000 of interest was included in the general expense.

The WITNESS: Which was it we found?

Mr. WILLIAMS: We found October, '72, $28,000.

Mr. KETCHAM: There is an item here of interest to the Farmers' Loan and Trust Company, payable April, '72.

The WITNESS: That is the one we found.

Mr. WILLIAMS: No, that is not what we found; we found October first, '72. April 1872 is what we are looking for.

The WITNESS: We will have to take the time to look it up. Mr. Ketcham was looking at the interest account, and that has got in April the same item that we found in October.

Mr. KETCHAM: The same item; not simply a similar amount, but the same item.

The WITNESS: The same item.

Q. What was expended in 1872 for construction and equipment?

A. The total amount of that account is $231,125.56. Of that sum there is reported and charged to cost of road $207,087.30,
1655 leaving the sum of $24,038.26 for construction and equipment.

Q. That gives us then as an expenditure for construction and equipment for the year 1872 outside of and beyond what was charged to cost of road, $24,038.26?

A. Yes sir.

Q. And that you have noted on page 5 of Exhibit 55, have you not?

A. Yes sir.

Q. You have, have you?

A. Yes.

Q. Have you any exhibit which has been introduced in evidence which will enable you to tell without delay how much interest was paid on bonds in 1872.

A. I think not.

Q. I simply thought if you had that that might throw some light on the other question which we passed.

A. The interest account, Exhibit 46, is what I was looking at a while ago. That only shows one payment.

Q. The secretary in his statement for 1872 shows $56,000 of interest paid that year?

A. Yes.

Q. That would represent seven per cent. on eight hundred thousand dollars of bonds outstanding, wouldn't it?

A. Yes sir.

Q. The secretary under the head of expenditures for that year reports $12,198.58 profit and loss. Have you any means, Mr. Duy,

of explaining that item, telling us what it was for, from your exhibits?

1656 A. No sir, I think not.

Q. You haven't introduced any statement as an exhibit which shows the full profit and loss account, have you?

A. Exhibit 48, itemized profit and loss account to November 30, 1872.

Q. From the beginning?

A. Yes sir.

Q. Exhibit 48?

A. Yes, and it is our number 48. Well it starts in 1851. I guess that is the first of it. That is why I was looking at now, to find some explanation of this item.

The MASTER: What is that Exhibit 48 A; a supplement to it?

Mr. HAWKINS: 48 A covers the two months of that year as a supplement to it.

Q. Mr. Duy, please look on page 13 of your Exhibit 48.

A. Yes.

Q. I call your attention to the following journal entry there "To treasurer: For amount transferred from Van books the same being expense occasioned by a revision of amounts"—You have it,—I suppose, "accounts."

A. Accounts it should be.

Q. (Continuing:) "For eighteen months commencing July first, 1870 and ending December 31st, 1871, $14,794.62." Now, at the top of that same page, I call your attention to these two items:

1657 "By treasurer, profit on sale of two shares of Union Star Line stock at $95..... $4,750.00
Less original cost..... 2,500.00

Balance..... $2,250.00

and

"Treasurer: For amount transferred to Van books, the same being occasioned by revision of the amount paid superintendent and clerks of the motive power department for six months ending December 31, 1871..... $346.04."

Now the total of these two credit items makes $2.596.04 which, if deducted from $14,794.62 on the other side of the account leaves you a balance of $12,198.58

A. Yes, that's right.

Q. That explains that charge from profit and loss on the secretary's statement, does it not? That is, it appears to be made up from those figures?

A. The amounts appear to show that it is made up from these. I can't understand it.

Q. Why it should be?

A. Why it should be so. That is to say, I can't understand why he should deduct from that the profit that he made on the sale of that Union Star Line stock.

Q. It would seem all right to deduct that other item of three hundred and forty-six dollars and some cents?

A. Oh yes.

Mr. WINTER: What is that first item of $14,794.62?

1658 Mr. WILLIAMS: That is the amount transferred from the Vandalia books, being the expense account for the revision of the accounts for the six months ending December 31, 1871.

Mr. WINTER: That means that they went over the Vandalia books, revised them, and charged up the expense of it?

Mr. WILLIAMS: Oh, no; that was the result from the revision. A change of them.

Mr. WINTER: That is, a correction?

Mr. WILLIAMS: Yes sir, I take it to be that.

Mr. WINTER: It says "being expense of revision," don't it?

Mr. WILLIAMS: It is charged up to expense.

Mr. WINTER: Expense occasioned by revision?

Mr. WILLIAMS: Yes sir. When they first commenced to operate the Vandalia road, which they did on this date, July first, 1870, there was an arbitrary and preliminary agreement as to the division of expense between the two companies, and that was revised afterwards, and this makes the result of that revision a loss; that is, a charge to the T. H. & I. Company of $14,794.62 more than it had been before that time,—before the amounts were revised. Please understand, I am not wishing to testify, but that is the actual explanation.

Mr. WINTER: That was my idea, but when they used the word "expense" I supposed they overhauled the accounts aftter there had been a change, and they used the word expense as meaning the expense of examination of the books.

1659 Mr. WILLIAMS: We simply had to bear that much more proportion of the expense than we had in the way the accounts had been kept, and he has charged that to profit and loss.

Q. Now, Mr. Duy, will you please take the aggregate of the following items of expenditure made in 1872: General expenses, $41,977.02; construction and equipment, $24,038.26; interest on bonds, $56,000. And deduct that aggregate from what was left of transportation earnings as you gave them to us a while ago, amounting to $343,267.81.

A. The aggregate of the amount given me is $122,015.28; deducting that from the former balance leaves $221,252.53.

Q. Mr. Duy, please take Exhibit 41, being statement of net earnings from December first, 1872 to January 15, 1873. That exhibit shows that you take one eighth of the net transportation receipts together with one eighth of income from all other sources for that year, and obtained in that way an income for the fractional period named of $36,658.15. Is that right Mr. Duy?

A. That covers net earnings from transportation, car service, rent, and interest and exchange account.

Q. What is the total amount of those three items outside of transportation earnings?

A. What do you mean?

Q. $715,80 from car service; $265.00 from rent; and $404.48 from interest and exchange.

1660 A. $1,385.28.

Q. Now please tell me of what amount that is one eighth? That represents one eighth of what amount?

A. $11,082.25.

Q. I call your attention to the secretary's statement for that year in which he shows revenue from sundry sources outside of transportation earnings of $11,620.69. That is practically in agreement with your estimate; is it not?

A. Yes sir, practically; there is a difference of a few dollars.

Q. Which might well arise from computing the fractional part of the year?

A. Yes sir; the difference is about five hundred dollars.

Mr. KETCHAM: $538.45

Q. The secretary shows earnings from other sources to an amount $538.45 in excess of the amount upon which you base your estimate; is that right?

A. Yes sir, I think he must have something else in there besides those three sources. The three items upon which I base my estimate are the exact amounts entered on the journal to those three accounts.

Q. Then there is probably some other source from which he got that $538.45

A. There must be some other source.

Q. Mr. Duy in stating the total operating expense for that year the secretary includes under the head of general expenses the taxes, does he not?

A. Yes sir.

Q. And the interest on floating debt?

A. Yes.

1661 Q. In your statement you haven't taken into consideration, as you have not done in other statements either, these transportation statements, any interest paid that year?

A. Yes.

Q. Can you tell me what the interest was that was paid that year?

A. Not from any statement I have.

Q. The secretary shows interest on funded debt.

A. He has interest on floating debt.

Q. Yes sir; but he has below interest on funded debt and discount on bonds sold $125,660.

A. Oh, yes.

Q. Do any of the exhibits that you have introduced take into account in any way?

A. No I think not. (Examining statements) I don't think I have any statement showing that.

Q. To put the statement for 1872 on the same footing as I have been getting you to make for the other years, there should be one eighth of the interest that was paid that year deducted from the amount of net earnings that you gave, should there not?

A. The statement for 1873 you mean?

Q. I mean 1873.

A. Yes sir.

Q. And the amount of interest you are not able to give me?

A. I can give it to you from the books, I guess.

Q. Well, I mean without looking it up.

A. Not from any statement that I have; I can give you that from the books.

Q. You say you can give me, Mr. Duy, the amount of
1662 interest paid in 1873?

A. According to the ledger, yes sir, I can give it to you.

Q. Please do so.

A. On Ledger D, page 162, interest account is charged $74,060, interest on bonds.

Q. One eighth of that would be what

A. $9,257.50

Q. Now, Mr. Duy, won't you please take one eighth of $11,620., being the amount of revenue from sources other than transportation as reported by the secretary.

A. $1,452.59. $1,452.58 plus.

Q. Now, will you please add that last amount to one eighth of the net earnings, from transportation, deduct from the sum one eighth of the interest paid on the bonds as you gave it just now and give me the remainder.

A. $27,467.96.

Q. In any of the exhibits that have been introduced in evidence, Mr. Duy, is there any note made of expenses other than interest and taxes for the year 1873, that is expenditures I mean.

A. No sir, I think not.

Q. The secretary's report for that year shows a large expenditure, but he states that it is charged to construction account. Do you find that statement, Mr. Duy?

Mr. KETCHAM: Mr. Williams, will you permit me to make a suggestion. I suggest that you ask him to prepare an exhibit
1663 covering this year with such data and on such basis as you desire and that we adjourn and let him prepare it; perhaps that will expedite matters.

Mr. WILLIAMS: Well, I don't want anything except to show that there were expenditures and that they were charged to construction. It is not material at all and I don't want to put him to the trouble to make exhibits.

A. Yes sir.

Q. Well, upon the plan, or in accordance with the plan upon

which we have been proceeding, these expenditures will not be taken out of the earnings.

A. No sir.

Q. Having been charged to construction account?

A. Yes sir.

Whereupon, the hour of 12 o'clock m. having arrived, a recess was taken until 2 o'clock p. m.

1664 TUESDAY, *October 17th*, 1899.

Afternoon session.

The parties met pursuant to adjournment.
Present the same as before recess.

The cross-examination of GEORGE C. DUY was resumed, as follows:

Questions by JOHN G. WILLIAMS, Esq.:

Q. Mr. Duy in addition to the expenditures that we have been considering up to this time on account of operating expense, interest, taxes and additional expenditures, there were amounts paid each year on account of dividends and some years on account of tax on dividends, were there not?

A. Yes sir.

Q. Will you please turn to Exhibit 44, being statement of cash and stock dividends and tell me in what year the first dividend was paid?

A. In 1853.

Q. How much was that dividend Mr. Duy?

A. $51,358.73 declared; it was not all paid during that year.

Q. Well, there is where I got stuck in going over your statement of the dividends.

A. You asked me the question as to the first year, I think

Q. Yes sir. Please look on page 1 of that exhibit and see if you don't find there an item reading like this: By general transportation account for dividend No. 1 on $632,357.10 at four per cent. per annum?

1665 A. Yes sir.

Q. $25,296.24.

A. That is right, yes that is here.

Q. That entry was under date of January 18, 1853.

A. Yes.

Q. And do you know when that dividend was declared?

A. I read from record A under date of January 18, 1853: "Ordered, that a dividend of four per cent. per annum be paid out of the income of the company for the past year on the capital stock; also that the eastern stockholders be paid at the office of the Farmers' Loan and Trust Company in the city of New York and the western stockholders at the office of the company in Terre Haute, the dividends being payable on and after the 28th."

Q. The declaration of the dividend then shows that it is a dividend against or out of the income of the property for 1852.

A. Yes sir; the record, however, don't say so,—the report I mean.

Q. Will you please read what the report of the president says about that.

A. That is the report of January 17, 1853, page 6; "We have made provision to pay a dividend of four per cent. by a temporary loan which may be paid by the sale of county bonds on hand or an increase of the capital stock."

Q. Well that does not negative——

A. (Interrupting.) It doesn't negative the earnings of 1852.

Q. That doesn't negative the idea that the dividend was declared out of the earnings of 1852.

1666 A. The order says, out of the revenue of '52, but the report says, that they are to make a temporary loan for the purpose of paying it.

Q. Yes. I see what you have in mind. That is explained, is it not, by the preceding sentence in the president's report where he says that he has made use of the present income in payment of construction?

A. I suppose that explains the reason why he did not have the cash on hand to pay the dividends.

Q. Now, Mr. Duy, you show another dividend which you group under the year 1853 of $25,710.49. I read from page 20 of Exhibit 44.

A. Yes.

Q. Can you tell me out of what earnings that dividend was declared?

A. It doesn't say that in the journal. Journal A, page 239, has the following entry: Surplus account to dividend account for dividend July 1st, on $734,585.60, three and a half per cent., $25,710.49 Record A, under date of July 12th, I find the following entry: We, the undersigned committee, appointed to report to the board of directors of the Terre Haute and Richmond Railroad Company the amount of dividend, which in our judgment should be paid to the stockholders for the six months ending June 30th, state that we find that the surplus remaining from the income of the road for 1852 to be $45,860.05; and net earnings of the road for the six months ending June 30th $43,090.55; making the aggregate sum of $88,950.60; out of which had been paid a dividend of four per cent. for 1852 on $429,424, interest on $600,000. of the seven per

1667 cent. bonds from September 1852 to March 1st, 1853, $21,000, interest on six per cent. bonds from January to July $1,363, making $47,657.24; leaving a surplus of $41,293.36; out of which should be deducted the accrued interest from March to July on seven per cent. bonds, $14,000, leaving for division $27,293.36. That the amount of capital stock July 1st, was $724,534.60——

Mr. HAWKINS: Seven thirty four on your statement.

The WITNESS: Seven twenty four is what it says here.

A. (Continuing:) "On which sum we recommend a dividend of three and one half per cent., $25,362.58."

Mr. HAWKINS: $25,610.49;" that is what the book says.

Mr. WINTER: There may have been some more stock issued before the dividend was declared.

A. (Continuing:) "Which report was unanimously adopted." That is all that I discover about it here.

Mr. KETCHAM: It will take $734,534.60 to make that amount of dividend at three and one half per cent.

The WITNESS: The journal has it seven thirty four. the same as I have it. There don't seem to be any formal declaration of the dividend further than the adoption of that report, and that
1668 shows that the first dividend was paid out of the earnings of 1852, and the second one out of the earnings up to June 1st, 1853.

Q. Please take the third dividend appearing on page 20 of Exhibit 44. What does it amount to?

A. The third dividend declared is $29,546.

Q. Now, will you please find out when the resolution was passed, declaring the dividend and out of what earnings it was declared.

A. January 19th the dividend is payable. It was declared December probably. The journal entry is in Journal A, page 268, January 19, 1854, surplus to dividend account. For dividend this day declared on the capital stock $738,650, for the six months ending December 31st, four per cent. Record A, January 19th, 1854: "Ordered that a dividend of four per cent. on the capital stock out of the net earnings of the company for the six months ending December 31st, 1853, be declared."

Q. Now Mr. Duy, please turn to the secretary's report, as it appears in the printed volume of reports for the year 1853. Have you that before you?

A. For the year ending December 31st, 1853, yes sir.

Q. I will ask you if in that report, dividend No. 1 of $25,294.24, doesn't appear to have been charged against the year 1852?

A. Yes sir.

Q. And if the dividends Nos. 2 and 3, paid in July 1853 and January 1854 were not both charged against the year 1853?

A. They are.

1669 Q. Now, taking those two dividends Nos. 2 and 3 as a charge against the year 1853, what would be the total amount of dividends declared and paid for that year?

A. $55,256.49. That is the amount of dividends declared, passed to the credit of dividend account. They were not all paid, actually paid, but they stood to the credit of that account until they were paid.

Q. They are charged though?

A. Charged out of the earnings.

Q. Charged out of the earnings and appear in the accounts of the year for which they were charged, do they not?

A. Well, the dividend declared in January, the third dividend declared in January, 1854, is charged to surplus account on the 19th of January, 1854. The earnings of the previous year had gone to the credit of surplus account at the close of the year.

Q. Well, the only difference that it makes with me is an individual one. I could check so much more easily with you by grouping them for the years out of which the earnings were used to declare the dividends.

A. I understand.

Q. That is the way they appear on the secretary's statements. But we will have to check it as you have it I guess.

A. I can follow you, I guess.

Q. So that the way the books show, there was one dividend paid for 1852, and then dividends 2 and 3 out of 1853.

1670 A. Yes sir.

Q. And 4 and 5 for the next year?

A. There was one dividend on hand all the time.

Q. And you have got 1 and 2 together instead of 2 and 3 together.

A. Yes sir.

Q. That is what makes it so difficult for me to check. So Mr. Duy you have as dividends declared for the year 1853 what?

A. That is 1 and 2.

Q. Yes, if that is the way you have it.

A. $51,004.73.

Q. What have you for the year 1854?

A. $74,201.

Mr. HAWKINS: That includes dividends No. 4 then?

The WITNESS: 3 and 4; 1854.

Q. What for the year 1855, Mr. Duy?

A. $93,645.

Q. What for the year 1856?

A. Cash separate?

Q. Yes sir, cash separate.

A. Two regular dividends, $98,282.50, and a fractional dividend $4,970, making a total of cash dividends $103,252.50. Then there is a third dividend of $75,799.50 making a total of $179,052.

Mr. KETCHAM: You are excluding from these questions the stock dividends, are you?

1671 Mr. WILLIAMS: I am going to ask him about it. He gave the cash separate.

Mr. KETCHAM: I thought the question called for the whole and cash separate.

Mr. WILLIAMS: It did virtually.

Q. Now you have spoken of giving the cash dividend separately Mr. Duy. There was a stock dividend that year wasn't there?

A. Yes sir.

Q. Of what amount.

A. The whole amount of the dividend declared was $216,570, of which $4970 was paid in cash and stock issued for $211,600.

Q. That $4,970 paid in cash is the item for that amount which you have just included in the statement you gave me of the cash dividend?

A. Yes sir.

Q. Now what dividend was declared in 1857, Mr. Duy?

A. $163,374.

Q. What in 1858?

A. $137,645.

Q. What in 1859?

A. $137,895.

Q. What in 1860?

A. $138,145.

Q. What in 1861?

A. $138,145.

Q. What in 1862?

A. $170,054.

Q. What in 1863? Please give me that dividend exclusive of the tax on dividend.

A. $195,708.50.

1672 Q. What amount of dividend tax was paid in 1862? Not in 1863; there was some paid in 1862, was there not?

A. Not according to this statement.

Q. Have you no account of a dividend tax paid in 1862?

A. Not on this statement. I have in the next year. On page 11 of this Exhibit 44 I find under date of June 23, 1863, U. S. tax on December dividend, not heretofore charged in dividend account, $3,115.69.

Q. That was the amount paid in 1862.

A. That was the amount paid on the December dividend 1862.

Q. Now what was the tax on dividend paid in 1863?

A. $6,052.82.

Q. What were the dividends declared in 1864, stating the cash dividend separately from that of the stock dividend made that year?

A. Two regular dividends amounting to $203,964; and a fractional dividend of $3,912.50, making $207,876.50.

Q. Mr. Duy, haven't you made a mistake there?

A. Yes, decidedly.

Q. That is three hundred and seven, isn't it?

A. Three hundred and seven.

Q. Then amount of $307,876.50 represents all the cash paid?

A. That is the cash dividends, yes sir.

Q. What was the cash dividend paid that year?

A. The stock dividend was $380,612.50, less paid in cash $3,912.50; stock issued $376,700.

Q. And that item of $3,912.50 is the one you included in giving me the amount of the cash dividend?

A. Yes sir.

1673 Q. What taxes on dividends were paid that year, 1861?

A. On the regular cash dividend there was $13 524.98, and on the stock increase, $11,771.51, making a total of $25,296.49. The amount of the tax on the regular dividend is $13,524.98.

Q. Where do you get those items please, Mr. Duy?

A. On page 21; and the total amount is as I gave it $25,296.49.

Q. Mr. Duy, I think in making up your summary you have omitted an item of $2,473.10. If you will look on page 12 of Exhibit 44, you will find there that the tax on the June dividend was $5,997.30, instead of $3,524.20, which you give in your summary.

A. That is right.

Mr. HAWKINS: It is $3,524.20 here.

Mr. WILLIAMS: Where?

Mr. HAWKINS: On page 12.

Mr. WILLIAMS: Look right immediately above those figures on page 12, right down on the bottom; stockholders for Government tax on June dividend $5,997.30; less amount charged above $3,524.20; and the balance is carried out as $2,473.10.

Q. That item is simply omitted from your summary.

A. Yes sir.

Q. Correcting the amount you gave me before by the addition of $2,473.10, what do we have as the total tax on dividends for the year 1864?

A. $15,998.08.

Q. Now, please add to that the tax on stock dividend of

1674 $11,771.51 and give me the total.

A. $27,769.59.

Mr. KETCHAM: Cash dividend was $307,876.50; stock dividend $376,700; and the total tax $27,769.59?

The WITNESS: That is the way I have it.

Q. What amount was declared in dividends for 1865, Mr. Duy?

A. $234,978.

Q. That is 1866, isn't it, Mr. Duy?

A. Yes, sir.

Q. I asked you for 1865.

A. $230,898.

Q. What taxes were paid that year, 1865, on those dividends, Mr. Duy?

A. $12,152.52.

Q. What dividends were declared in 1866?

A. $234,978.

Q. What taxes were paid on those dividends for that year?

A. $12,367.23.

Q. What dividends were declared in 1867?

A. Dividends of 1867 $277,641.

Q. What taxes were paid on those dividends for that year?

A. $14,612.70.

Q. What dividends were declared in the year 1868?
A. $238,578.
Q. What taxes were paid on account of those dividends that year?
A. $12,556.70.
1675 Q. What dividends were declared in 1869?
A. $238,578.
Q. What amount of taxes were paid on those dividends for that year?
A. $12,556.70.
Q. What dividends were declared in 1870?
A. $119,289.
Q. Then you didn't give me near enough for 1869, did you? There is where we get apart again.
A. There were three declared in 1871; only one in 1870, according to this statement.
Q. Yes, the three came in afterwards, didn't they? Then you say the dividend for 1870 was $119,289?
A. Yes sir.
Q. What was the tax on that dividend?
A. $6,278.35.
Q. What dividend was declared in 1871?
A. $357,867.
Q. What taxes were paid on those dividends in 1871?
A. $9,176.07.
Q. What dividends were declared in 1872, Mr. Duy?
A. $119,289.
Q. What taxes were paid in 1872 on the dividend that year?
A. $499.11
Q. Does the journal show any reason why it was so small?
A. Five twelfths of one per cent.
Q. Mr. Duy, was there a dividend declared in January 1873?
A. Yes sir.
Q. For what amount?
A. $119,289.
1676 Q. And so far as you have discovered there was no Government tax on that, was there?
A. No sir, there was no Government tax. The dividend was ordered on the 6th of January.
Q. Mr. Duy, what was the next dividend declared after that one of January, 1873?
A. The next dividend is July, 1873, $119,289.

(By Mr. KETCHAM:)

Q. No tax?
A. No tax.

(By Mr. WILLIAMS:)

Q. What period does that cover?
A. The period is not stated.

Q. Well, all the other dividends have been for the six months preceding the date they were declared.

A. Yes sir, and this I take it is the six months preceding the 30th of June.

Mr. KETCHAM: Is it the six months preceding the 30th of June, or the six months of the fiscal year which ends the 30th of November?

Mr. WILLIAMS: I think it would be the fiscal year.

Mr. KETCHAM: 30th of November and the 31st of May. They wouldn't be making the dividend for the whole fiscal year I take it.

Mr. WILLIAMS: No, I think we should regard it as being made for the first six months of that fiscal year.

Q. Then there would be forty seven one hundred and eightieths of that applicable, wou.dn't there, to this account, Mr. Duy?

1677 A. Yes sir, I think so, one fourth for six months.

Q. Well count it that way then. We count it on the eighths. Now will you please give us what one fourth for six months amounts to?

A. $29,822.25.

Q. Mr. Duy, all of these taxes on dividends about which you have testified were paid by the company in addition to the dividends were they not?

A. Yes sir.

Q. The summary of cash dividends attached to Exhibit 44, on page 22, shows a total of $3,834,701.42, which total includes all the tax on dividends included in the statement. There is omitted from that statement, is there not, the tax on dividends in 1862, amounting to $3,115.69, and also an item of tax on dividends of $2,473.10 for the year 1864, is there not?

A. Those two last items are omitted from the summary.

Q. If those two last items be added to your summary what will it give you as the total of dividends and taxes?

A. $3,840,290.21 cash dividends and taxes.

Q. Now will you please add to that, Mr. Duy, the proportions we took for the dividend declared in June 1873, stated at $29,822.25?

A. $3,870,112.46.

Q. Mr. Duy, have you any means there before you of dividing now that total you gave last into cash dividends and into taxes?

A. It will take some time.

Q. I can give you the taxes, and that will be the least amount, and you can deduct them, can't you?

1678 A. Oh, yes sir.

Q. Taxes, 1862..... $3,115.69
Taxes, 1863..... 6,052.82
Taxes, 1864..... 27,769.59
Taxes, 1865..... 12,152.52
Taxes, 1866..... 12,367.23
Taxes, 1867..... 14,612.70
Taxes, 1868..... 12,556.70

Taxes, 1869	12,556.70
Taxes, 1870	6,278.35
Taxes, 1871	9,176.07
Taxes, 1872	499.11

A. $117,137.48

Q. Now, deduct that please, from the aggregate we had just now of dividends and taxes, namely, $3,870,112.46 and give me the balance?

A. The balance is $3,752,974.98

Q. Then that last amount represents the true total of the dividends declared during the period covered by this account?

Mr. KETCHAM: That is a conclusion, if the master please. We think the other is the legal effect,—that where the dividends were declared free of Government tax, as shown by the records here, the amount paid for dividends—for the Government tax on dividends—is legitimately a dividend for the stockholders. The internal revenue law of the United States was paramount to the charter granted to the Terre Haute road. It was the paramount law of the land, and this burden was imposed by the laws of the United
1679 States on all sorts and conditions of men, and it was a tax upon the income of the parties to whom the tax was applicable.

Mr. WILLIAMS: Now, will you please show me that? If you will permit me to interrupt you, just refer us to that law?

Mr. KETCHAM: I will. It is the internal revenue law of 1862. The facts are now before the master. The witness ought not to be required to state conclusions. It is well enough in this line of Mr. Williams' examination, and we have not objected to it, to have Mr. Duy testify to Mr. Williams' argument; that is all right; we are not objecting to that but when it comes to testifying to the law, we submit that the master will declare the law after the witness has stated the facts.

Mr. WILLIAMS: Will you please read my question, Mr. Reporter? (Pending question read by the reporter) Now those are the dividends declared, and that is what we have gone through all the time. There never was a dividend declared unless it is represented in that total.

Mr. WINTER: The dividends were declared as so much per centages on the capital stock?

1680 Mr. WILLIAMS: And that total represents the per centages on the capital stock; that is what we are getting at. I want to say that this was not a tax on the income of the stockholders, but it was a tax against the railroads themselves that they were required to pay, and the law gives them permission to take that out of the dividends as they are declared; but it is a tax against the railroad company itself.

The MASTER: So far as the question asks for a legal conclusion of the witness, the question is objectionable, and these legal inferences from the facts will have to be settled on the final hearing. The

witness need not answer as to any legal conclusion from those facts; he can qualify his statements so as to exclude anything like that from his answer. He need not answer it to that extent.

Mr. WILLIAMS: What I had in mind, if the master please, was that these percentages declared were the declared dividends, and I was asking with that in mind, without any thought of getting in the question anything that would call for a conclusion on his part of whether these taxes form part of the dividend or not. They were not declared as part of them

Mr. KETCHAM: As a matter of fact, they were.

1681 Mr. WILLIAMS: Well that is what I don't think. That we can let go until further along.

The MASTER: Now as I understand the objection to that, your question asks for an aggregate and the legal effect of that. Now he can limit his answer to what the aggregate is.

A. My recollection is that all these dividends name a percentage payable to stockholders free of taxes, and this balance covers the aggregate of that percentage; but the percentage and the tax are all entered in the dividend account.

Q. Please get the corporate record and read therefrom the declaration of the dividend of December, 1862?

A. On motion,——

Mr. HAWKINS: Give us the book and page.

A. (Continuing:) The book is Record A, December 23, 1862; it is not paged; "On motion, ordered, a dividend of seven per cent., and the Government to be paid by the company, on the capital stock for the six months ending November 30th, payable to the stockholders registered on the company's books on that date, payable on and after January second."

Q. Is there a word left out? I didn't hear you say "Government tax."

A. No, it doesn't say tax; it says, "and the Government to be paid."

Q. Now please read the resolution declaring the dividend of June, 1863?

1682 A. This is Record 2, page 3: "On motion it was ordered that a dividend on the capital stock of six per cent. free of Government tax, for the six months ending May 31st be paid to the stockholders registered on the books of the company at that date, May 31st, 1863, payable on and after July 3rd."

Q. Now read the resolution declaring the dividend in December 1863, or in January 1864, for that dividend, whenever it was.

A. Record 2, page 10: December 21, 1863. "On motion of Judge Deming, a dividend of seven per cent. free of Government tax on the capital stock for the six months ending November 30, 1863, to the stockholders registered on the books of the company at that date, payable January 2nd, 1864."

Q. Now the resolution declaring the dividend of June 1864.

A. The same record, page 19: "On motion it was ordered that a dividend on the capital stock of six per cent. free of internal revenue tax for the six months ending May 31st, be paid to the stockholders on and after July 5th."

Q. Now the resolution declaring the dividend of December 1864.

A. The same record, page 25: "On motion it was ordered that a regular dividend of five per cent. for the six months ending November 30th, free of Government tax; for the six months ending November 30th an extra dividend of five per cent. free of Government tax, both payable to the stockholders registered on the books of the company November 30th, on and after January 9, 1865."

1683 Q. Now the resolution declaring the dividend of June 1865?

Mr. KETCHAM: Before you leave that, ask about the resolution of April 6, 1864; hadn't you better put that in that year?

Q. Yes, have you there, Mr. Duy, the resolution of April 1864, declaring the stock dividend?

A. April 5th is the marginal date; the same record, page 16: "On motion it was ordered, that in consideration of the receipts of the company having been applied to and used in erecting bridges, relaying track, constructing side tracks, purchasing new machinery, equipment and other necessary expenses which had been charged to earnings, the capital stock therefore be increased twenty-five per cent to cover such expenditure. Moved by Mr. Rose to make the resolution read twenty instead of twenty-five per cent. Not carried. Mr. Rose then moved the passage of the original resolution, which was adopted, all the parties present voting in the affirmative except Mr. Franklin, who voted no. It was ordered that the increase of twenty-five per cent. on the capital stock be made to the stockholders registered on the books of the company on the 9th of April, full shares to be issued, and fractions paid in cash. Eastern stockholders will receive their certificates and fractional payments at the office of the Farmers' Loan and Trust Company, and western stockholders at the office of the treasurer of the company

1684 on and after May the 1[illegible]th."

(By Mr. KETCHAM:)

Q. Nothing said about Government tax?

A. Nothing said about tax.

(By Mr. WILLIAMS:)

Q. Now the resolution declaring the dividend of June, 1865, please.

A. The same record, page 33: "On motion it was ordered that a dividend of six per cent. free of Government tax be declared on the capital stock for the six months ending May 31st, payable to the stockholders registered on the books of the company at that date; payable July 5th."

Q. Now the resolution declaring the dividend of December, 1865?

A. The same record, page 37: December 31, 1865: "On motion

of Mr. Rose a dividend of six per cent. and Government tax was ordered on the capital stock for the six months ending November 30th, payable on and after January 2nd, 1866."

Q. Now the resolution declaring the dividend of June, 1867?

A. The same record, page 77; date July 3, 1867. "Resolved, that a dividend of six per cent. free from Government tax be and the same is hereby ordered on the capital stock for the six months ending May 31st, 1867, inclusive payable on and after July 10, 1867 to such stockholders as are registered on the books of the company on the 3rd of July, 1867, it being understood that Fredrick Bronson has sold his stock to this company, and that the dividend on said stock belongs to said company."

1685 Q. Now the resolution declaring the dividend of December, 1867.

A. The same record, page 84, December 24, 1867. "On motion of Mr. Rose it was ordered that a dividend of eight per cent. be declared on the capital stock for the six months ending November 30th free of Government tax, payable on and after January 8th, 1868 to those stockholders who were registered on the books of the company on the 30th day of November."

Q. Now the resolution declaring the dividend of June 1868.

A. The same record, page 108, June 24, 1868. "On motion it was ordered that a dividend of six per cent. be declared, exclusive of Government tax, for the six months ending May 31st, payable on and after July 6th."

Q. Now the resolution declaring the dividend of December, 1868.

A. Page 113, the same record. December 19, 1868. "On motion of Mr. Rose it was ordered that a dividend of six per cent. be declared on the capital stock, free of Government tax, for the six months ending November 30th, payable on and after January 6th, 1869."

Q. Now the resolution declaring the dividend of June 1869.

A. The same record, page 127. June 23rd, 1869. "On motion by Mr. Rose it was ordered that a dividend of six per cent. be declared on the capital stock of the company free of national tax for the six months ending May 31st, and payable on and after July first."

1686 Q. Now the resolution declaring the dividend of December, 1869.

A. The same record, page 132; December 24th, 1869. "On motion of Mr. Rose it was ordered that a dividend of six per cent. be declared on the capital stock of the company, free from Government tax, for the six months ending November 30th, 1869, payable on and after July 10th, 1870."

Q. Now the resolution declaring the dividend of June, 1870.

A. The same record, page 139: June 23rd, 1870. "On motion of Mr. Rose it was ordered that a dividend of six per cent. be declared on the capital stock of the company, free of Government tax, out of the earnings of the company for the six months ending May 31st, 1870, payable on and after July fifth, proximo."

Q. Now the resolution declaring the dividend of December, 1870.

A. The same record, page 148, January 3, 1871. "On motion of Mr. Rose it was ordered that a dividend of six per cent. be declared on the capital stock of the company free of Government tax and payable on and after January 3rd, 1871."

Q. Now the resolution declaring the dividend of June, 1871.

A. The same record, page 155; meeting of July first, 1871. "Mr. W. A. K. Edwards moved that the rate of dividend be made six per cent. free of Government tax. The motion carried and the same ordered payable on and after July 15th."

Q. Now the resolution declaring the dividend of December, 1 71.

1687 A. The same record, page 159, December 26, 1871. "On motion of Mr. A. McGregory it was ordered that a dividend of six per cent. be declared on the capital stock of the company, free of Government tax, payable on and after January 15th, 1872." There is an addition to that entry in pencil: "To stockholders registered on the books of the company on November 30, 1871."

Q. Now the resolution declaring the dividend of June, 1872.

A. The same record, page 173; June 29, 1872. "It was ordered that a dividend of six per cent. be declared on the capital stock of the company free of Government tax, payable on and after July 15th, 1872, to stockholders registered on the books of the company May 31st, 1872, said dividends payable to western stockholders at the office of the company at Terre Haute, and to eastern stockholders at the office of the Farmers' Loan and Trust Company, New York."

Q. Now the resolution declaring the dividend of December, 1872.

A. The same record, page 175——

Mr. KETCHAM: Wait a minute; there was no Government tax in connection with that, Mr. Williams. Do you want to call for it?

Mr. WILLIAMS: Well, I don't care to pursue it any farther.

1688 Whereupon, the hour of five o'clock p. m. having arrived the hearing adjourned until tomorrow at two o'clock p. m.

1689 WEDNESDAY, *October* 18, 1899—2 o'clock p. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, with the exception of Judge Robert S. Taylor, of counsel for plaintiff.

The cross-examination of the witness, GEORGE C. DUY, was resumed, as follows:

By Mr. WILLIAMS:

Q. Mr. Duy, I wish to direct your attention first to three items of expenditure in the years 1860 and 1861 which I find I omitted in my examination as to the expenditures for those years. In 1860 was there not an expenditure made for a telegraph line and for half the cost of a depot at Greencastle Junction?

A. In additional expenditures, I suppose it would be. (Referring.) They appear on Exhibit No. 50.

Q. Give me the amount of them, please, separately.

A. Telegraph $1,217.80. Depot at junction $985.

Q. Making a total of what, please?

A. $2,202.80. Those two items were charged to profit and loss account.

Q. They appear in the secretary's report for that year, do they not?

A. Yes sir.

Q. As statement No. 3, in account with the stockholders of the Terre Haute & Richmond Railroad Company.

A. Yes sir.

1690 Q. He does not call it profit and loss account that year, but I suppose that is what it is intended for, is it not?

A. I guess it is an amalgamation of profit and loss and surplus.

Q. He has got statement No. 3, "in account with the stockholders" &c.

A. I never understood exactly what that was.

Q. But those two items appear in that account?

A. Yes sir.

Q. Now, in 1861, was there not an expenditure that year for a new passenger station at Terre Haute?

A. I have it on Exhibit No. 50, improvement, general passenger station. I will have to look further.

Q. That is the item I have reference to. What is the amount of it?

A. The amount is $8,969.77, charged to surplus account.

Q. And don't you find it in statement No. 3, of the secretary for that year, under the same heading, namely, in account with the stockholders of the Terre Haute & Richmond Railroad Company?

A. Yes sir.

Mr. WILLIAMS: If the master please, those three items I did not show in my examination the other day, covering those two years, and I will, at the proper time hereafter, deduct them from the statement of those two years respectively, made in Mr. Duy's former testimony, reducing the net earnings of those years, to that extent.

1691 Mr. WINTER: We might as well do it now, so as not to have to go back over it again. I have the figures here. That will make the net earnings for 1860 $191,195.70, and then for the other year, 1861, it would be $181,439.99 That is on your figures, Mr. Williams. That is as the result of Mr. Williams' cross-examination.

Mr. WILLIAMS: That is right.

Q. Please turn to Exhibit No. 10, being summarized construction account. What is the total amount of discount shown by that exhibit to have been charged to construction account?

A. $96,913.36.

Q. And what is the amount of interest?

A. The total amount of interest charged, $57,321.76. That is the amount charged to interest.

Q. And what is the discount?

A. $96,913.36. And there is credited to interest account $4,657.54, leaving the net charge to construction for interest, $52,664.22.

Q. And why did you deduct that general credit? Oh, that is a credit to the interest account.

A. It is a credit to construction account on the books.

Q. And it comes from interest account.

A. Yes sir.

Q. Now, what years does that exhibit show those charges to have been made to construction account?

A. From between 1849 and 1852.

Q. What years does the statement show?

1692 A. 1852.

Q. So far as the statement is concerned, all those items, discount and interest, appear to have been charged in 1852.

A. Yes sir, so far as this statement shows.

Q. Will an itemized statement of those items of discount and interest be found in your itemized construction account, being Exhibits No. 3 and 4? If you do not like to answer that I will go into detail.

A. I am just trying to find out. I had the itemized statements here, but they don't seem to balance.

Q. I will go along with you and pick them out, if you prefer not to answer the general question. I was only leading up to it.

A. What is that question?

Q. Will an itemized statement of those items of discount and interest be found in your itemized construction account, being Exhibits No. 3 and No. 4?

A. There are attached to Exhibits 3 and 4, exhibits showing the itemized interest account for those periods from which these charges are derived.

Q. Please turn to page 13 of Exhibit No. 3, and give me the amount of discount charged out in 1849?

A. $95.

Q. Will you make a memorandum of that, please, as we go along?

A. Yes sir.

Q. This discount account was a separate account kept on the ledger and then it was transferred, as we explained the other day, to the construction account, along in 1852?

1693 A. Yes sir.

Q. Mr. Duy, on the same page of Exhibit 3, what discount appears to have been charged out for the year 1850?

A. I make it $6,928.

Q. There is $700 difference there, between us?

A. There is $700 in there, yes sir. That is right. $7,628 is what it is.

Q. $7,628.

A. That is right.

Q. On page 13 of Exhibit No. 3, it appears that the $95 of discount in 1849, was on ninety shares of stock sold in Philadelphia, October 26, 1849?

A. Yes sir.

Q. What stock was that? Terre Haute & Richmond stock?

A. Terre Haute & Richmond stock.

Q. Does the ledger show any more about the transaction than the notation you give there? I mean the journal; I should not have said the ledger.

Mr. HAWKINS: Page 13.

A. Discount to treasurer, for discount allowed to John Ray, on twenty shares, $60; ditto, to John Hazelton, $10; ditto, to John Griggs, $10; ditto, to Evans Rogers, $10; ditto, to Daniel Haddock, $5, $95.

Q. That is the full entry, as you have read it?

A. Yes sir. The entry above that shows that it was capital stock. The treasurer is charged with the money, and this is charged to discount account.

1694 Q. On page 13, Exhibit No. 3, there appears a discount to the amount of $2,912, in the first ten items for that year, as being on bonds sold?

A. Yes.

Q. Can you tell me by reference to the journal, what bonds those were?

A. I can tell you without reference from here. They were six per cent. bonds.

Q. You mean that they were the company's six per cent. bonds?

A. The company's six per cent. bonds, yes sir.

Q. A part of the issue of $600,000.?

A. No, sir, a part of the issue of $75,400.

Q. That $600,000. issue was seven per cent. bonds?

A. Yes sir, they were seven per cent. bonds, and they are all designated, as far as possible, on the exhibits.

By Mr. KETCHAM:

Q. The seven per cent. bonds were not issued in 1850, were they?

A. No sir.

By Mr. WILLIAMS:

Q. Now, read me one of the journal entries concerning the discount on those bonds?

A. Discount account to treasurer, for discount on the above bonds, namely—giving the numbers of them—sold at eighty-six cents on the dollar, being seven hundred dollars, $700.

Q. Has the treasurer been charged anywhere with the full amount of the face of the bonds?

1695 A. Yes sir.

Mr. HAWKINS: You mean, Mr. Williams, the first ten items of the year 1850?

Mr. WILLIAMS: Yes sir, the year 1850.

The WITNESS: The treasurer is charged above there in two entries, with $5,000., and bond account is credited.

Q. That one item you had, what did the discount appear to have been on the bonds, in that one journal entry?

A. Fourteen per cent.; sold at 86 cents; fourteen per cent. on $5,000. is $700. The numbers of the bonds are given here.

Q. I do not care for that.

A. And the denomination.

Q. Now, on this same page 13, the items immediately following the ones I have just given, relate to discount. The first item following this I immediately gave you, relates to discount on five Vigo County bonds, and then down through the exhibit there appears two more entries under the year 1850, of discounts on Vigo County bonds. Will you give me the journal entry for one of those items covering Vigo County bonds?

A. Journal "A," page 26, sundries to Vigo County bonds, Charles Wood, June 5, cash received for five county bonds, sold D. Demming, June 5, 1850, numbers one to five inclusive, at eighty-
1696 five cents, $1,000. each, $4,250. Discount account for discount on above bonds, $750, $5,000.

Q. Were these Vigo County bonds the bonds given by the county in payment for its subscription to the stock of the company?

A. Yes sir.

Q. Do you know if the other journal entries relating to those Vigo County bonds, in 1850, are of the same nature as that one you have just read?

A. They are the same general nature. I can turn to them in a moment.

Q. I do not care for it, if they are the same kind of a transaction. You can see, though.

A. The item on page 33 is the same, excepting that Mr. Demming was allowed $2.50 interest, and the treasurer charged with that much less. Interest account was charged with two dollars and a half and discount with the same.

Q. Now, all the items relating to 1852, on page 13 of that exhibit, are either Vigo County bonds sold, or six per cent. bonds sold, are they not?

A. In the year 1850?

Q. Yes sir.

A. Yes sir.

Q. Please look at pages 13 and 14 of Exhibit No. 3, and give me the amount charged for discount in the year 1851?

A. $41,198.

Q. I will call your attention to a credit of $44.05, on that discount account, in 1851.

A. Yes sir.

Q. Should not that be deducted, so as to give me the net balance?

1697 A. Yes sir.
Q. Please do that.
A. $41,153.95.
Q. Now, what were the character of transactions concerned in the discount for the year 1851?
A. All that discount was upon Vigo County bonds, and the bonds of the company, and the capital stock of the company.
Q. That included some seven per cent. bonds sold as well as six per cents., didn't it?
A. Yes sir.
Q. It included one hundred shares of capital stock sold to Jennings?
A. Yes sir.
Q. And five hundred shares sold to Rose?
A. Yes sir, and twenty shares sold to—name not given.
Q. Now, will you read me from journal, page 52, the entry as to the seven per cent. bonds sold at that time?
A. (Reading:) Sundries, to seven per cent. loan, treasurer for amount received April 22, of S. Crawford, for bonds No. 244, 245 and 246 and 247, dated March 1st, 1851, payable in fifteen years, interest payable semi-annually, March 1st and September 1st, at the Farmers' Loan and Trust Company, New York, sold at eighty-eight cents, $3,520. Discount account, for the discount on above bonds, $480. $4,000. $4,000.
Q. Now, read me from the journal, page 64, the entry relating to the sale of 500 shares of capital stock to J. Rose.
1698 A. Journal, page 64. Sundries, to capital stock, Chauncy Rose, for net amount received from John Rose, for 500 shares sold him, at $40. per share, $20,000., less interest from the 31st of May, the time of payment, to the 15th of August, $19,746.67 Then follows date when the payment would be due, "as per agreement at sale of the stock on the 15th of February. Interest account for amount of above interest, allowed John Rose, $253.33. Discount account, for discount on above stock sold, twenty per cent. below par, $5,000., total $25,000."
Q. The shares were fifty dollars each, were they not?
A. Fifty dollars, a share, par value.
Q. On page 14 of Exhibit 3, what amount of discount appears to have been charged out for the year 1852?
A. $38,838.91.
Q. Have you taken into consideration the credits there of $632.50 in giving me that amount?
A. No sir, only the fifty.
Q. Mr. Duy, that is not a credit below.
A. No, that is a debit.
Q. It is only fifty dollars; you took that in. You ought to add that to what you had, oughtn't you?
A. I am going to, yes sir. It is out of whack some way.
Q. The difference between your footing at the close of the year

1851, $18,876.95, and your footing, $88,298.36, at the close of the year 1852, gives you the right amount, don't it?

A. It ought to; it should do so, but it don't seem to pan out right.

1699 Q. What do you get as the difference between those footings, $48,876.95, at the close of the year 1851, and $88,298.56, at the close of the year 1852?

A. That is what it is, $39,421.41.

Q. That is the discount charged out for the year 1852, so far as that exhibit is concerned?

A. Yes sir.

Q. Now, will you please turn to page 11 of Exhibit 4, and give me the amount charged there, for the year 1852, under the head of discount?

A. $8,615.

Q. That makes a total of what, for the year 1852, as shown by the two exhibits?

A. $48,036.41.

Q. Now, returning to page 14 of Exhibit 3, I find there an item of discount on the company's note. Please look at journal, page 114, and give me the entry for the item.

Mr. HAWKINS: That is on Exhibit No. 3?

Mr. WILLIAMS: Page 14, of Exhibit No. 3.

A. (Reading:) Terre Haute, January, 1852. Sundries to bills payable. Treasurer, January 7th. Proceeds of W. H. Thornburg's note, discounted at Branch Bank of Terre Haute, $650.43. Discount account for discount on above note, $9.57.

Q. I asked you about the company's note, on page 114.

A. On page 114, the entry is "Sundries to bills payable. Treasurer, for his note, discounted at Branch Bank of Terre Haute, of date January 13th, at four months, due May 12th and 15th, for $5,000. $4.897.50 discount account, for discount on above note $102.50

1700 Q. Now, look at page 129 of the journal and give me the entry covering two notes at Indianapolis.

A. (Reading:) Discount account to sundries. To bills payable discount on a note for $2,500., discounted at bank at Indianapolis, February 6, $51.67. Discount on note, discounted at Indianapolis February 21st, $51.67, $103.34. Bond account, for discount, on bonds, No. 309, 310 and 311, sold C. S. Mills, January 20, at $88., $36. Total, $139.34.

Q. That will be enough about that, Mr. Duy. Does that seem to be the company notes that they discounted?

A. I should judge so. Wait a moment. Yes, I judge so.

Q. The other note up there on page 114, was the treasurer's note given to the company, was it not?

A. It says, "For his note." Yes sir.

Q. Given to the company and discounted?

A. I suppose made for the company, I don't know.

Q. Now, the other items on page 14, of Exhibit 3, relating to 1852, are discount on sales of shares of capital stock, and on sale of some more Vigo County bonds, and sale of six per cent. bonds and sale of seven per cent. bonds, are they not?

A. Yes sir.

Q. Now, on Exhibit 4, page 11 there are only two items there appearing, and they explain themselves as well as the journal entry would, I guess, don't they?

A. I think so.

Q. You need not look at it, I think, Mr. Duy. On the company's note, $4,000. discounted August 2nd, $30., and on 3027 shares sold in New York, $8,585?

A. Yes sir, that is right. That is all.

Q. That was the company's stock?

1701 A. Yes sir.

Q. The company's own shares of capital stock, journal, page 185.

A. Yes sir, that was the company's stock. It refers to the stock journal for the number.

Q. Have you before you the several amounts you have given me covering the discount for 1849, 1850, 1851 and 1852?

A. Yes, I have them here.

Q. Then please give me the aggregate of them, and see if it balances with your summarized statement?

A. $96,913.36.

Q. Does that balance with your summarized statement?

A. Yes sir.

Q. Please turn to page 20 of Exhibit 3, and tell me how much was charged out for interest in the year 1849?

A. Net, $404.89.

Q. How much for the year 1850?

A. $1,612.70.

Q. Is that net?

A. Yes sir.

Q. After deducting the credit of $305.17?

A. No, part of that went off in 1849.

By Mr. KETCHAM:

Q. Does that take account of the error of ten dollars in that footing above there, of $360.98?

A. No sir.

Q. That is just simply as it is on the book, without correcting the error?

1702 A. Yes sir.

By Mr. WILLIAMS:

Q. Now, in that is the item that you gave there, 1850; I see several notes discounted. Was this interest and discount treated indiscriminately?

A. Yes sir.

Q. First one account and then the other?

A. Yes sir.

Q. I mean, would they charge sometimes the same kind of an item to discount, and sometimes the very same kind of an item to interest?

A. Yes sir.

By the MASTER:

Q. It was substantially the same account, then, was it?

A. Practically, yes sir.

By Mr. WILLIAMS:

Q. I see here one entry of W. D. Wood, interest on salary past due, six months?

A. Yes.

Q. $30; and immediately below that, a note in bank, $139.50?

A. That is a month afterwards. It is the next month.

Q. Look at journal, page 32 and read me the entry as to that note in bank?

A. Page 32, July, 1850, sundries to treasurer, amount
1703 brought over, $1,873.83. Interest account, July 5th, paid interest on note, bank, 54—meaning voucher—$139.50. July 1st, coupons, the interest on stock, 86,—meaning voucher— $231.48. Carried out, $360.98. Should be $370.98.

Q. What explanation can you give us as to that item of coupons, interest on stock?

A. At a certain period, I don't know exactly when, there was an order of the directors that interest should be paid to subscribers for stock upon the payments that they had made up to a certain time, and there were coupons issued for it, or certificated. It amounted to quite a sum.

Q. The subscriptions were opened conditioned upon the payment of one or two dollars per share at the time of the subscription?

A. Yes sir.

Q. Then, if a man paid more than that, or paid for instance the full face value of the stock, they would give him, or allow him interest on that?

A. Yes sir, allow him interest on it up to a certain date, that brought them all up together, on an equal basis. There was quite a considerable sum. I have forgotten just how much it amounted to.

Q. Look at page 47 of the journal, and see if that item of coupons redeemed, $868.91, is of the same character.

A. That is it. He says "coupons redeemed," and I take it that is—I don't know whether that is coupons for the bonds, or the stock certificates.

Q. You would not know from that entry which it was?

A. No sir.

1704 Q. Now, on pages 20 and 21 of Exhibits No. 3, please give me the amount of interest charged out for the year 1851.

A. $5,325.47.

Q. That is the net amount after allowing all the credits that appear on the exhibit for that year?

A. Yes sir.

Q. How do you get that balance?

A. There is $2,017.59, carried down from 1850 to 1851, and that is included in the footing, $15,618.58; so I take that out, and it leaves me $13,600.99, as the debits, and the credits are $8,275.52, for that year.

By Mr. WINTER:

Q. How much is the balance which is carried into the $15,618.58, from 1850?

A. $2,017.59.

By Mr. WILLIAMS:

Q. You did not take into consideration, then, the item of $1,812.54, appearing at the bottom of your exhibit, on page 22?

A. No, that is in 1852.

Q. Is it in 1852?

A. Yes sir. That is journal page 151 you are looking at.

Q. Oh, yes, I see. I believe I made the same mistake before. The entries on this exhibit indicate in a general way, the character of the transactions, do they, as far as they are shown by the books?

1705 A. Yes sir.

Q. I will not go over them in detail. How much is shown by Exhibit No. 3, to have been charged out for interest in the year 1852?

A. I make it $53,747.84.

Q. Do you mean for 1852?

A. Yes sir.

Q. We have it $53,737?

A. I expect you have got the $10 mistake in there.

Q. That is right. Will you please tell me how you get that?

A. The first footing there, on page 22, is $64,250.76 The credits are $5,072.37. That leaves $59,178.39, and there are additional debits, making $59,278.36. Then there is a debit of $1,812.54. That makes a total of $61,090.90. But that includes a balance of $7,343.06, brought down from last year, which leaves a net debit, for 1852, of $53,747.84.

Q. Now, turn to page 7 of Exhibit No. 4.

A. Yes.

Q. And give me the interest charged out on that exhibit for the year 1852?

A. $205.40.

Q. Now, there appears on that exhibit a credit, does there not?

A. Yes sir.

Q. For how much?

A. $3,974.54

Q. Now, if you add to the amount we got just now from Exhibit

3, the $205.40, that is on Exhibit 4, and deduct from it the $3,974.54, that will give us the net interest charge for 1852, will it not?

1706 A. Yes sir.

Q. Please do that, and give me the result.

A. $49,978.70.

Q. Now, will you add together the items of interest you have given me for the years 1849, 1850, 1851, and 1852, and see whether it balances with you- summarized statement in Exhibit No. 10?

A. Yes, $57,321.76. That is entitled to a credit which comes in afterwards.

Q. Now, what is the character of the further credits to which it is entitled?

A. Why, on Exhibit No. 5, being construction account for 1853, and exhibits on page 29, balance of interest account is $4,657.54, to the credit of interest, and that is transferred to the credit of construction account, December 31, 1853. All the other was charged to construction account, and this is credited to construction account,

Q. What exhibit is that you have?

A. This is No. 5.

Q. Exhibit No. 5.

A. Yes sir, the last item on the last page.

Mr. KETCHAM: Journal A, page 267.

Q. Now, no more interest and discount than what we have just given, was charged to construction account, was there?

A. No sir, not to this construction account.

Q. That embraces all the items of interest and discount that went into construction account?

A. Yes sir.

1707 Mr. KETCHAM: Mr. Williams, did you ask him for the final balance?

Mr. WILLIAMS: Yes sir, I asked him if it finally balanced, and he said it did.

Mr. HAWKINS: Did he give the final figures, after deducting the $4,657.54?

Mr. WILLIAMS: I don't think he did.

Q. Mr. Duy, will you now please give us the final balance, the net balance of interest, carried to construction account, after deducting the credit you have just given of $4,657.54?

A. $52,664.22.

Q. Mr. Duy, in Exhibit No. 43, there appears to be given a detail of additional expenditures, such as rebuilding bridges, culverts, real estate for depot and gravel, locomotives, cars, and so forth. Does that exhibit embrace expenditures made only out of transportation earnings, or out of all funds, surplus, profit and loss or otherwise?

A. Out of transportation earnings alone.

Q. It does not include anything that was paid for out of surplus?

A. I think not.

Q. Have you any exhibit which has been already introduced, upon which is stated expenditures made for items of that character, rebuilding bridges, real estate, equipment, etc. outside of those paid for out of transportation, and shown in this Exhibit 43?

A. Our Exhibit 50, I think, shows all those expenditures.

Q. Now, will this Exhibit 43 and Exhibit 50 together show
1708 the entire amount of those additional expenditures or is this Exhibit No. 43 duplicated on Exhibit No. 50?

A. No, there is nothing additional on 50.

Q. There is nothing that is on 50 that is on this Exhibit 43?

A. No. Exhibit 50? There may be some things. There is nothing on this, on 50.

Q. How much was expended in 1857, for rebuildong bridges and culverts?

A. $36,912.03.

Q. Please put those down as you go along.

A. All right.

Q. How much in that year for real estate for depot grounds?

A. $100.

Q. How much for real estate for gravel?

A. $736.

Q. How much for passenger cars?

A. $4,514.78.

Q. How much for baggage, freight and coal cars?

A. $9,850.04.

Q. How much for stationary machinery?

A. $2.538.84.

Q. How much for extension of the depot at Indianapolis?

A. $8,896.89.

Q. Now, what do these items you have just given me, make in the aggregate?

A. $63,548.58.

Q. And that amount was charged directly against transportation earnings for that year, was it?

A. Yes sir.

1709 Q. What was spent in the year 1858, for rebuilding bridges and culverts?

A. $15,890.07.

Q. What for the extension of depot at Indianapolis?

A. $715.95.

Q. What for a new boiler shop?

A. $931.19.

Q. What do those items aggregate?

A. $17,537.21.

Q. Were they all paid out of transportation?

A. Yes sir.

Q. I mean, charged directly out of transportation earnings?

A. Yes sir.

Q. What was spent in 1859 for rebuilding bridges and culverts?

A. I do not find anything.

Q. We did, once before.
A. There is repairs of bridges.
Q. What item have you for repairs of bridges?
A. $7,530.98.
Q. The secretary gives it in his statement as rebuilding bridges and culverts.
A. The account is repairs of bridges, on the books, on the ledger.
Q. Under what head were these other items you have given me, for 1857 and 1758, kept on the ledger?
A. It is repairs on the ledger.
Q. What is repairs?
A. The former items that I have given you.
Q. Appearing in the same account with the one for 1859, don't they?
1710 A. Under the same heading, not the same account.
Q. But you gave that, did you not, for the year 1859, $7,530.98, under the head of rebuilding bridges and culverts, in your summary here, of additional expenditures, didn't you?
A. Let me look at my statement.
Q. Exhibit 43.
A. I do not want that.
Q. That is what I am referring to. I am asking you if you didn't put that item under the head of rebuilding bridges and culverts?
A. Yes sir I did. I want to explain the apparent discrepancies between these statements.
Q. Have you got it now?
A. I think so.
Q. Please furnish any explanation you may have.
A. On Exhibit 26, which is the itemized transportation account for 1858, on page 2 appears an item, repairs of bridges, Exhibit C, $15,890.07, and that is under the heading given on the ledger. Towards the bottom of the same page is the following paragraph: "The above items of expenditures, $211,877.78, are in the secretary's report of December 23rd, 1858, divided as follows"—and it goes on and gives the division, and amongst them, "additional expenditures, rebuilding bridges and culverts, $15,890.07," which is the same item as in the body of the account on the ledger here, charged to repairs of bridges. In making up this summary, Exhibit No. 43, the summary of additional expenditures, the language used by the secretary in his report, is adopted instead of repairs of
1711 bridges, as the ledger and our accounts, themselves, have it.
Q Well, the only trouble is that Exhibit No. 26 refers to the year 1858, and I am asking you about 1859.
A. Very well. I referred to 1858, and I am referring to 1859. You asked me about 1858, before, I think.
Q. No sir, I am asking you about 1859, the item of seventy-three hundred and some odd dollars.

Mr. KETCHAM: There isn't any such item.
Mr. WILLIAMS: Seventy-five hundred and some odd dollars, then.

A. Give me Exhibit No. 27, please. I got that one because you had asked me about 1858.

Mr. KETCHAM: You told him to go back and see about 1857 and 1858.

The WITNESS: Do you want 1859?

Q. You have given me 1859, and you wanted to make an explanation, and in making an explanation of why you now give me as repairs of bridges, an item which you put in your Exhibit No. 43, as rebuilding bridges, in 1859, you read me an exhibit which refers to 1858, and not to 1859.

A. Exactly, but I said, in making this Exhibit 46, we have followed the language of the secretary, as he designated it, and put it down under the head of rebuilding. That is what I mean. That is why I put this repairs $7,530.98, under the head of rebuild-
1712 ing bridges, because we followed the language of the secretary. That explains the apparent discrepancy, it seems to me.

Q. All right, then. What was paid, in the year 1859 for extension of depot at Indianapolis?

A. $372.72.

Q. Now give me the aggregate of those two items, $7,530.98 and $372.72, please.

A. $7,903.70.

Q. What was expended in 1860, for new cars built?

A. $5,459.08.

Q. What for new station building at Greencastle?

A. $1,797.13.

Q. What for rebuilding bridges and culverts?

A. $7,433 38

Q. What for a telegraph line?

A. $1,217.80

Q. What for a new depot at the junction with the Louisville, New Albany and Chicago railroad?

A. $985.

Q. Now, will you please give me the aggregate of those items?

A. $16,892.39

Q. What was expended in 1861, for new passenger station at Terre Haute?

A. $8,969.77

Q. I forgot to ask you as to the charging out of those items in 1859. Were they charged directly against transportation?

A. The first three were, and the last two were charged to profit and loss.

Q. In 1859?

1713 A. Oh, 1859—I beg pardon. They were all charged to transportation.

Q. All charged to transportation?

A. Yes sir.

Q. That is the total $7,903.70?

A. Yes sir.

Q. Now, what were the items in 1860 charged, amounting to $16,392.39?

A. Do you want the total of the different charges?

Q. Yes sir, if you can give it to me conveniently?

A. Charged to transportation, $14,689.59. Charged to profit and loss, $2,202.80.

Q. To what account was the new passenger station, at Terre Haute, charged?

A. Charged to surplus account.

Q. Now, in 1862, how much was expended in that year for new freight cars?

A. $20,895.04

Q. What for additional telegraph wire?

A. $1,086.12

Q. What is the aggregate of those items?

A. $21,981.16

Q. To what account was that amount charged?

A. To surplus account.

Q. Now, in 1863, how much was expended for rebuilding bridges?

A. $39,229.73

Q. How much for new locomotives?

A. $37,343.50

Q. How much for new freight cars?

A. $42,705.02

Q. How much for new buildings and extensions?

1714 A. $3,271.54

Q. What do those four items aggregate?

A. $122,549.79

Q. To what account were they charged?

A. $42,501.27 charged to transportation, and $80,048.52 charged to surplus.

Q. How much was expended in 1864 for new locomotives?

A. $102,741.90

Q. How much for new passenger cars?

A. $10,930.30

Q. What for new baggage and freight cars?

A. $34,979.58

Q. What for new buildings?

A. $4,863.38

Q. How much for rebuilding bridges?

A. $6,742.80

Q. Now, will you please give me the aggregate of those five items?

A. $160,257.99

Q. Now, have you the various aggregates of the items we have just been going over from 1857 to 1864, inclusive, so that you can give me the aggregate of them. If not, I will call them to you.

A. I have got them all here, but they are not in very good shape.

Q. Before I go on to that, what was this expenditure in 1864, charged to?
A. Surplus account.
Q. All of it?
A. Yes sir.
Q. Now, in 1857 we had $63,548.58; in 1858, $17,537.21
1715 in 1859, $7,903.70; in 1860, $16,892.39; in 1861, $8,969.77 in 1862, $21,981.16; in 1863 $121,549.79; in 1864, $160,257.99; please give me the aggregate of those.
A. $419,640.59
Q. That agrees with our footing, $419,640.59. And if the master please, this is a good place to stop.

Whereupon the further hearing was continued until tomorrow, Thursday, October 19th, 1899, at 10 o'clock a. m.

1716 THURSDAY, *October* 19, 1899.

Morning session.

The parties met pursuant to adjournment.
Present: The same as on yesterday.

Cross-examination of the witness, GEORGE C. DUY, was resumed as follows:

Questions by JOHN G. WILLIAMS, Esq.:

Q. Mr. Duy, Exhibit 50 is designated "Statement of expenditures exclusive of operating expenses, interets and dividends"?
A. Yes sir.
Q. It purports to cover from 1853 to 1856, inclusive, 1857 to 1863, inclusive, 1864 to 1871, inclusive, and 1871?
A. Yes sir.
Q. There is attached to it what is headed "Recapitulation of certain expenditures exclusive of operating expenses, interest and dividends" from 1853 to 1871 inclusive" as detailed in statement No. 65, Exhibit No. 50. That recapitulation foots up,—or should I say, the footing of that recapitulation is $2,018.954.61. The footing of the exhibit outside of the recapitulation is $1,669,846.47.
A. One million six hundred and seventy-nine thousand.
Q. Well, I ought to have said $1,679,846.47 There appear in pencil two items, namely, $14,964.43 and $324,143.71,——

1717 Mr. HAWKINS: What page?
Mr. WILLIAMS: Page six.

Q. (Continuing:) Which, having been placed below the footing of the exhibit footing and added to it makes a footing in pencil of $2,018,954.61. Those items, however, of $14,964.43 and $324,143.71 have, by reason of being carried forward from previous pages already been included in the footing of $1,679,846.47, so far as I understand the exhibit. Now please tell me if I am correct?

The master states that the pencil items referred to were put on the exhibit by him.

Mr. WILLIAMS: Upon further examination I find that the pencil item of $14,964.43 and the pencil item of $324,143.71 appear respectively on pages one and two of the exhibit and were not carried forward so as to enter into or form part of the footing on page six of $1,679,846.47.

The WITNESS: Mr. Williams, you will find that this item of $51,651.33 in 1870 for South Branch construction is in twice in this recapitulation.

Mr. WILLIAMS: No. I did not know anything about that.

The WITNESS: You will find it so, look at it and see, 1870 and 1871.

1718 Q. I find, Mr. Duy, on page 6 of the exhibit an item for South Branch construction of $51,651.33 in the year 1870; and also find on the same page for the year 1871 South Branch construction $6,205.51 and of course understand that that item of $51,651.33 has been duplicated. We obviated that difficulty in making our statement of expenditures yesterday, didn't we, or the day before?

A. Yes sir.

Q. By charging $51,651.33 in 1870, and then only taking the difference between that and the difference between the sixty-two thousand dollar item for 1871?

A. That is correct.

Q. This exhibit then to be accurate should show a credit of $51,651.33, should it not?

A. Yes sir, both on the exhibit and on the recapitulation. That is the reason I called your attention to it.

Q. I am very much obliged.

A. Yes, you will recollect it is just as the books stand.

Q. But the books show a credit back of that fifty one thousand, and you don't show it on the exhibit.

A. That is right.

Q. The books show that fifty one thousand was credited back, as we explained. Mr. Duy, just before we adjourned yesterday evening you gave me as the footing of certain items of expenditure, which we had taken down in detail, $419,640.59, which embraced expenditures from 1857 to 1864 both inclusive. The item of expenditure, as we stated it for 1864, was $160,257.99 If that be deducted from $419,640.59, what will we have as the expenditures from 1857 up to the close of 1863 as we stated them yesterday?

A. $259,382.60

1719 Q. In the recapitulation on Exhibit 50 you give $261,347.60 as the expenditures from 1856 to 1863, on account of rebuilding bridges, real estate and improvements, equipment, repairs and real estate for gravel and telegraph lines. The amount thus given on the recapitulation is $1,965, in excess of the aggregate of the items we were considering yesterday. Can you tell me without any

trouble what that difference is, if any? I can suggest it perhaps and you can verify it.

A. I didn't make this recapitulation, and I cannot tell you without examining into it.

Q. You will find under the head of additional expenditures for the year ending November 30th, 1857 an item of $1560 for patent brakes which I did not give you yesterday. Do you find that?

A. Yes sir.

Q. And you will find under the head of additional expenditures for the year 1858 an item of $405 for equipment which I did not give you yesterday. Do not those two items make up the difference between the amount as stated on the recapitulation on Exhibit 50 and the amount yesterday?

A. Yes.

Q. Mr. Duy, in going over the books, which were submitted to you, did you find anything that would throw any light upon, or indicate the character of the work done for which expenditures were made under the head of rebuilding bridges and culverts?

A. Yes sir, I think so.

Q. Where did you find it?

A. In the journal.

Q. Anywhere else?

1720 A. Oh, rebuilding bridges and culverts; I cannot answer that question now.

Q. Well, what you found on the journal will appear in your itemized statement of construction, won't it?

A. Yes sir.

Q. You explained yesterday that the ledger account under which these expenditures were found was an account headed repairs of bridges?

A. Yes sir.

Q. And it was in the secretary's report they were classified as the rebuilding of bridges and culverts?

A. That is my recollection of it, and it was so in what I looked at yesterday.

Q. Well, it was from the secretary's report that I asked you the question. Please turn to the Ninth Annual Report of the President and Directors of the Terre Haute & Richmond Railroad Company to the stockholders for the year ending November 30th, 1857, and read me what you find on page four of that report, beginning with the words, "While the operating expenses of the road etc.," down to the second paragraph from the bottom of the page.

A. (Reading:) "While the operating expenses of the road have not been unusually large, the aggregate expenditures have been increased by the making of permanent improvements, the cost of which has been charged to the income of the road, as by order of the board the construction account was closed last year. Owing to the difficulty of procuring suitable building material at the time the road was under construction, it was necessary to build some of

the bridge abutments and piers of timber. During the
1721 present year, these abutments and piers have been removed from six of the covered bridges, and cut limestone, rock masonry substituted, and a large part of the whole line has been supplied with limestone arch culverts and drains. The remaining two covered bridges will be rebuilt, with masonry, as early in the coming season as practicable. The trestle bridge White Lick has been replaced with a new covered Hows superstructure. Pine lumber was also procured, sufficient for five to six hundred feet of bridge superstructure, which has been framed, and carefully housed, in readiness for use when required. Ninety thousand new cross — and one hundred and fifty tons of new rails have been laid on the road bed."

Q. That is all that touches on the question of bridges. Please turn to the tenth annual report for the year ending November 30th, 1858, and read the first paragraph on page 5.

A. (Reading:) The masonry of the bridges mentioned in the report of last year has been completed, and nearly the whole line of road laid with new ties, and freshly ballasted, and we are warranted in saying that the road for permanence of way, and durability of structure will compare favorably with other first class roads.

Q. Please turn to the fourteenth annual report for the year ending November 30th, 1862, and beginning near the bottom of page nine, under the caption of bridges, read what you find there.

A. (Reading:) Bridges. Under this head it becomes necessary to mention the falling of the bridge across the West fork of White Lick creek, though the accident occurred the day succeeding
1722 the close of the business year. On Monday, December 1st, the How truss bridge, over the West fork of White Lick creek, gave way while a freight train was passing, and a portion of the train fell with it, killing a brakeman Isaac Pratt, and a stranger who was standing on the east abutment. The bridge had been well protected from the weather, and the timbers were all sound. Every precaution had been taken to guard against such an accident. A force was immediately set to work by the superintendent to clear away the debris, and erect a temporary trestle bridge; on the succeeding Thursday night the trains passed ever. Arrangements are being made to replace the bridge with one of Bollman's superior iron structures. The loss to the company is estimated at about twenty thousand dollars including the bridge and property destroyed.

Q. Please turn to the fifteenth annual report for the year ending November 30th, 1863, and read what you find on page eighteen, under the head of masonry.

A. (Reading:) "During the unusually high water——

Q. (Interrupting.) Wait a minute, Mr. Duy, please. Instead of reading under the head of masonry, please read on page seventeen what you find there under the head of bridges.

A. "The following six new bridges have been built and finished complete since the date of last annual report. At Croy's creek an iron decked bridge, on Bollman's improved patent, seventy-six feet

in length: at Crittenden a deck bridge on the same plan seventy-one feet in length; at West White Lick a through bridge on the same plan one hundred and six feet in length. These bridges
1723 are well planned and thoroughly constructed and finished and are very rigid under trains. At Eel river a new double span wooden bridge two hundred and seventy-two feet in length has been erected. At Plainfield, over Middle White Lick, a double span wooden bridge ninety feet in length has been completed. These bridges were built by contract on the improved How plan. Both the timber and iron of which they were constructed is of large size and of a superior quality. At Eagle creek a new double span wooden bridge, one hundred and ninety-two feet in length has been built and finished on the improved Burr plan. These works have been completed at a total cost of thirty-nine thousand two hundred and thirty-nine dollars and seventy-three cents. The material and workmanship in this bridge are also of superior quality. These three bridges are completed except covering and roofing, which is now progressing under a contract. The iron through bridge at White Lick and the three wooden bridges referred to, are all built of a sufficient height to clear seven feet over the tops of our highest freight or passenger cars, thus avoiding all danger to train employés from striking bridges.

Q. Now, what follows there, Mr. Duy, which relates to repairs on bridges?

A. (Reading:) "To all the following bridges more or less repairs, including new suspension rods, new floors and new tracks, have been made; White River bridge at Indianapolis, three spans, total length 420 feet; East White Lick 57 feet; East Mill creek at Pecksburg 65 feet; Middle Mill creek at Amo 71 feet; West Lost creek, two spans forty-five feet each, and one span of 40 feet. They
1724 are all in safe condition to carry the present traffic of the road and can be kept safe during another year, but they should be rebuilt during the coming year, provided the ruling of prices and labor and the materials will justify making contracts for their renewals. It is contemplated rebuilding these bridges with iron, White River bridge on the Bollman plan, the three next named with boiler plate box girders, and the spans of Lost creek with wrought iron plate girders. The bridge over White river would have been rebuilt during the past year but for want of time to complete the work before the fall freshets, after the six other bridges were completed, and the extraordinary cost of materials, which would have swelled its cost several thousand dollars beyond the estimates made early in the season for its reconstruction."

Q. Now, on that same page, eighteen, read what I first asked you to read.

A. (Reading:) "During the unusual high water in December last the arch culvert near Reelsville was washed out. This work has been replaced with a substantial stone arch 12 feet span, on a permanent foundation. A box culvert west of Wood's mills, which undermined last year, has also been rebuilt in a substantial manner.

Several stone cattle guards, and smaller culverts have also been built during the year. In addition to these, the parapet walls of the abutments of six new bridges, together with pedestals for the iron bridges, have also been put up in a thorough manner. The cost of masonry has been charged to rebuilding bridges."

Q. Please turn to the sixteenth annual report for the year ending November 30th, 1864, and read what you find on page
1725 twenty under the head of bridges.

A. (Reading:) "But one bridge has been built during the year, that a wrought iron bridge of fifty-seven feet span at Bridgeport. All the new bridges, both of wood and iron built during the year 1863 are in excellent condition, and fully meet our expectations with reference to their rigidity and firmness under trains. It was contemplated to rebuild within the past year the seven remaining original bridges as mentioned in our last report. Within a few months from the date of that report, the prices of materials and labor advanced so much that it was considered expedient to defer the renewal of these works until the return of more reasonable prices. These bridges have all been maintained in a safe condition. It is intended to rebuild them all during the coming year, if the prices of labor and materials will admit of making the necessary expenditures. The only masonry built during the year has been a small amount of culvert masonry, and seven sets of stone cattle guards. Several small culverts will require building next year. It will also be necessary to add several sets of new stone cattle guards, in addition to alterations and additions required in the abutments and piers of several bridges that should be rebuilt."

Q. Please turn to the seventeenth annual report for the year ending November 30th, 1865, and read me what you find on page twenty-one under the head of bridges.

A. (Reading:) "Since July last we have replaced the four original bridges at West Lost creek, Cloverland, Amo, and Pecksburg with
substantial and durable wrought iron girders. These are all
1726 well finished and painted, except that at Pecksburg, the finishing of which has been delayed on account of more important work. It will however be finished within the month of January. Owing to the continued high prices of labor and materials, and the unusual amount of work, and the expenses forced upon us by the unprecedented freshets in July last, we have not yet been able to commence rebuilding the bridge over White river. This bridge, with the additional truss rods put in it, still retains its apparent sound and safe condition but on account of its original light construction, we are of the opinion that its reconstruction should not be delayed beyond the coming summer. It has always been our intention to replace it with a permanent iron structure in order to place its safety beyond the risk of danger of fire to which it has always been much exposed. All other wooden bridges on the line are in safe and excellent condition, they have all been thoroughly painted and whitewashed during the past summer."

Q. Also what follows there under the head of masonry?

A. (Reading:) "In addition to the alterations required in the masonry of the several abutments on which the stone girders have been placed, four new and substantial stone arch culverts, one six feet, and three of ten feet spans, have been completed, together with several open and box culverts; besides these, work on the west abutment at Croy's creek, which was undermined by the July freshet, has progressed nearly to completion; to a moderate extent, it is proposed during the year to continue the rebuilding and enlargement of several of the old culverts, which have the past
1727 season proved entirely too small. Several of these we intended to rebuild during the past season, but were unable to do so for the reasons previously stated."

Q. Please turn to the eighteenth annual report for the year ending November 30th, 1866, and read me the paragraph which you will find near the top of page six concerning bridge building.

A. (Reading:) "A new heavy iron bridge of Fink's patent has been erected over White river 428 feet long to take the place of a How wooden structure erected at first at a cost of about $40,000. This makes seven iron bridges in the place of seven wooden bridges and leaves only three wooden structures on the road, which have all recently been rebuilt. Besides, we have six iron plate girder bridges spanning smaller streams and road crossings."

Q. Mr. Duy, will you please turn to Exhibit No. 45, being itemized statement of earnings other than transportation from interest, profit and loss and surplus accounts, 1849 to November 30th, 1872, and consolidation thereof. I notice that the consolidation statement begins on page 11 of the exhibit and that you have charged there as the first item for the year 1849, earnings from interest account, $35.59. That is hardly enough to spend much time on, but I would like for you to tell me how that got in there as an earning in your account, if you can. Just tell me where it came from and where it went to.

A. The first part of it came from premium on draft sold $5.24, and interest discounted by bank $30.35.

Q. What account was that charged on?

A. It is a credit to interest account found on page 4 of Exhibit No. 46.

1728 Q. How was that account closed if at all, and when?

A. The balance of the interest account went into transportation account.

Q. Well, then that has been accounted for, hasn't it?

A. In going over this interest account I believe you accounted for it. This Exhibit No. 45 shows items that we considered to be profit appearing in the interest account on the credit side.

Q. But when you carried over the balance from that account, which embraced this little item of interest in 1849 transportation account, and then took transportation account afterwards, you disposed of that little interest charge in 1849, didn't you?

A. Yes sir.

Q. So, don't you think that ought to be eliminated as an earning?

A. Well, that is an opinion. This exhibit here simply is a statement showing the credit items on interest account. It is left for somebody else to say whether they are earnings or not.

Q. W ell, as a bookkeeper, don't you think the method of handling that account and getting it into transportation earnings, and then accounting for transportation earnings in the way we have done ought to cancel that charge?

A. This is cancelled really so far as this account is concerned by the debits on this account.

Q. Yes, undoubtedly in 1849. But I say taking it in a general way only, that where a balance of an account like that which had been transferred to another, and that other account considered, that the transfer of that balance disposed of all the items that
1729 went to make it up. Now, the next item you have is in the year 1850, earnings from interest account $290.17 Please tell me how that was treated, and whether or not it went into transportation?

A. It all goes the same way.

Q. Now, in the year 1851 you have earnings from interest account $5,059.68. Didn't that go in the same way to construction?

A. The balance of the whole account went to transportation account.

Q. Went to transportation first, in 1851? We were not transporting much then, were we?

A. Well, it was closed out in 1852; the balance of the whole account was closed out in 1852.

Q. And went to transportation?

A. Yes sir, it run along until that time.

Q. What was that other item in 1851, earnings from profit and loss $859.35?

A. Where is that?

Q. Immediately under $539.68.

A. That comes from profit and loss account.

Q. You will find it on page 1, Mr. Duy, of Exhibit 48, being your itemized profit and loss account.

A. I didn't know you were looking at that.

Q. I was asking you what this item was on Exhibit No. 50 of $859.35.

A. Well, that is transferred from exchange accoount. $849.35 and $10.

Q. Which makes up the total of $859.35?

A. That is a credit transferred from exchange account to profit and loss.

Q. Well, was that an earning that has not been absorbed
1730 in any other account, Mr. Duy?

A. If that is a balance of exchange account it is an earning.

Q. Look at Journal A 99 and Journal A 104.

A. That is a credit to profit and loss account through exchange account of a series of credits in that account running through the

year from June to November. It goes directly from exchange account to profit and loss account.

Q. Didn't it get out of profit and loss?

A. It may have gone out in some charge to profit and loss; not definitely it didn't; it just went to the credit of profit and loss account like any other item.

Q. Mr. Duy, wasn't the whole balance of profit and loss account transferred November 30th, 1856, to surplus account? You will find it in Journal B page 112.

A. Yes sir, the balance of profit and loss went to surplus account at that time.

Mr. KETCHAM: What time?

The WITNESS: In December 1856.

Q. Now, will you please turn to the surplus account, Exhibit 47 on page 2.

A. Yes sir.

Q. There seems to have been only one entry in surplus account for the year 1856, doesn't there?

A. Yes sir.

Q. And that was that transfer from profit and loss of $117,956.74

A. Yes sir.

Q. Well it seems to have got into surplus, and I cannot
1731 get it out of surplus in any way that I can see. Now, Mr. Duy, the next item is for the year 1852, interest $1,242.65.

A. Where do you find it?

Q. On page 11 of Exhibit 45.

A. Yes, that is there.

Q. Well, now, didn't that go to construction?

A. I shall have to look that matter up.

Q. Do you think you could do it briefly?

A. The balance to debit—the amount to the debit of interest account went to construction.

Q. Well that would include it in the account wouldn't it?

A. That I cannot say off-hand.

Q. On Exhibit 46, which gives the itemized interest account at the close of 1852, the debit balance was $102,432.43, wasn't it?

A. That is the aggregate of the whole amount.

Q. On the debit side?

A. Yes sir.

Q. Well, then on the credit side on page 6 three items to construction account.

A. Yes sir, four on this page.

Q. Four is right, Mr. Duy. Then on page seven of that exhibit, Mr. Duy, it shows a balance of $129.40, which you reduce to a balance of $120. by reason of an error in posting of $9.40.

A. Yes sir.

Q. Leaving a balance as shown by the secretary's ledger of $120. December 31st, 1872, to the debit side of the account.

A. To the debit side, yes sir.

Q. Then you note down there, charge to construction
1732 account, page six and seven, $61,296.30; credit to same page four, $3,974.54; credit to same page nine, $4,657.54; total $8,632.08; which deducted from $61,296.30, leaves the amount really charged you say to construction account $52,664.22. Now, doesn't that indicate that all the items included in that account have by these transfers gone into construction?

A. No sir, I think not, as I have it in my mind now. The total debits to interest account are as you state, $102,342.33 Of that amount $52,664.22 is charged to construction, and $25,586, is charged to transportation account, and the rest of that is made up of receipts of interest, which go as a credit against the debits, and those receipts are earnings in some shape or other. They are balanced off by money paid out for other things and by these charges, and as earnings they are set down in this exhibit of ours of earnings there from transportation account. In your statement of the case as I understand it you have taken in the debit side of this interest account, except the debit items in this interest account, and given credit for these things, but in our statement they are not credited in it. That is the way I understand this statement.

Q. Well, you got that amount $1,242.65 somewhere, didn't you, from your exhibit?

A. Yes sir.

Q. Mr. Duy, please look at your evidence as it appears beginning on page 313, where we had up the transportation earnings for the year 1852, as shown by your Exhibit 22, and see if that will help you solve the question in any way.

1733 A. I don't think that helps me any now. (Witness answered after examining transcript of his evidence, as indicated.)

Q. Well, wouldn't it seem from that that all of that interest account up to the close of 1852, except that little balance of fifty-nine dollars, had been taken care of either in construction or transportation?

A. No sir, I don't think it would seem to me so.

Q. Well, suppose we pass it now, and if you can help me out on it later I will be glad to have you do so. Now, in the same year, 1852, on page 11 of Exhibit 45 there is an item of $352.91 as an earning from profit and loss.

A. Yes sir.

Q. Where will I find the items going to make up that charge?

A. You will find on page one, last two items to the credit of profit and loss; balance from Britton on 100 bbls. of salt $88.80; and interest account for balance of account $312.11.

Q. Those two items you gave me make $400.91, don't they?

A. Yes sir.

Q. I see opposite that item of the balance from Brittonof 100 bbls. of salt you have written here, "Profit $40.80."

A. Yes sir.

Q. Now you seem to have taken that as a proper earning and added it to $312.11.

A. Yes sir, I was trying to see where the other part of that statement is. I know the facts as the books show them. The transaction in salt showed that much profit.

1734 Q. And that is what you charged us with?

A. That is what I charged you with. You will see below there on the debit side $40. charged on the 100 bbls. of salt, toll on the 100 bbls. of salt.

Q. Yes sir; it came from equipment account.

A. Yes, they paid so much for the salt; there is $108. paid for the salt, and $40. toll, which made $148., and they got $188.80, leaving a balance of $40., or something like that, I don't remember just exactly how much it was.

Q. Now, Mr. Duy, at the bottom of page one don't you find there that balance of that profit and loss account for 1852 was credited to construction account $2,989.35?

A. Yes sir.

Q. Don't that dispose of this?

A. I don't think it changes the character of those items as being profit.

Q. Don't you think they have been taken care of by being carried to construction, reducing construction that much? Haven't we accounted for them in that way?

A. You have accounted for them in that way or by other debits.

Q. You have taken these three items that together go to make up this balance of $352.91 out of profit and loss for the year 1852?

A. Yes sir.

Q. And the whole statement of that account, or the result of that account at the end finally is credited to construction by way of a balance of $2,989.35

A. Yes, and that is what wasn't paid out.

1735 Mr. KETCHAM: It is a credit to construction?

The WITNESS: It is a credit to construction.

Q. It reduces construction account that much, and we have taken that into consideration in construction account. In other words, we have accounted for these earnings by crediting construction with them; we would have a right to charge for construction, and we have reduced our charge for construction by crediting it with this amount. They were undoubtedly, Mr. Duy, I wish to say from my point of view—they were undoubtedly earnings from sources other than transportation.

A. Yes sir.

Q. The only point I make is that they have been taken care of in another way by crediting them to construction, and should not now be charged against us in addition, to transportation earnings.

A. That would seem to me now to be the result of that credit.

Q. Now, Mr. Duy, in 1853 on page 11 of this Exhibit 45, you

have charged us with earnings from interest for the year 1853, $6,149.09.

A. Yes sir.

Q. Tell us please where you got that item, Mr. Duy.

A. That is in 1853. You asked me a while ago where I got the item in 1852. I did not answer the other.

Q. Well, it has been so long ago that we will pass it now for the present. Tell us where you got the item for the year 1853.

A. I will have to revise this interest account.

Q. Let me call your attention beginning on page nine of the Exhibit 46 being the interest account, on the credit side
1736 thereof you have charged with pencil the following items: Winslow, Lanier & Co., balance of interest on their account $159.36.

A. Yes sir.

Q. Treasurer: Receiver of stockholders 45 cents; amount received of H. Reagan $1.00; amount received from Vigo county on $11,400. of bonds, $684.; amount received from Southern Bank interest on deposit and premium on gold, $34.77; amount received Indianapolis & Bellefontaine Railroad Company for interest on bill of cars sold them, $130.62; amount received on stock sold J. L. Hadley on deferred payment on stock, $3.50; amount received on note Peru & Indianapolis Co., $121.80; amount of interest held by Union Depot Board, $1,586.76; premium and interest account transferred, $3,198.33

A. Yes sir.

Q. Now the sums of those items is?

A. $5,920.59

Q. And the difference between that amount and the amount you have charged us on account of interest in the year 1853, is $228.50. In red ink on page 10 of this same exhibit beside the amount transferred from premium and interest account you say: "Balance of $3,426.83 received, Ledger A, page 110."

A. Yes sir.

Q. Now, the difference between the amount shown on the exhibit as being transferred from premium and interest account, and the balance which you say is received, is exactly the difference $228.50.

A. I recollect now that is the way it is made up. I haven't got the statement that I worked on. I put in there the whole amount of the interest account.

1737 Q. Well, he had transferred what seemed to be a balance, did he?

A. Yes sir.

Q. And it was not a balance?

A. It was a balance, but we put in the whole credits as so much earned. In making up this statement of earnings, outside of transportation, we put in all that went to the credit of exchange account.

Q. Now, the interest account for 1853, as shown on pages 9 and 10 of this Exhibit 46, shows that construction account was credited that year with $4,657.54

A. Yes sir; which closed the interest account except $120.; that closed the interest account that year.

Q. Now, what effect would that credit to construction have upon the charge you make against us here of $6,149.09?

A. I think it is accounted for in construction account, after thinking about the suggestion.

Q. Now, for the year 1854, on page 11 of Exhibit 45, you have charged us with interest in the sum of $295.68

A. Yes.

Q. You seem to have picked out by your pencil check marks here a number of small items on the credit side of interest account that year, as it appears on Exhibit 46, and charged us with them.

A. Yes sir.

Q. I notice at the top of page 13 Exhibit 46, an item on the credit side of the interest account, of general transportation account, $40,962.67

A. Yes sir; that is the balance of interest account for that year.

Q. And taken into the general transportation account?

1738 A. Yes sir.

Q. Well, then, wouldn't that dispose of this item you have charged us with?

A. Yes sir.

Q. In 1855, Mr. Duy, you only have a charge on Exhibit 45 of $89.85, and it appears on page 14 of Exhibit 46 that the balance of interest account that year was taken to transportation account $35,291.13

A. Yes sir.

Q. Wouldn't that dispose of that charge?

A. Yes sir.

Mr. HAWKINS: That went to transportation.

Mr. WILLIAMS: Yes, to transportation account.

Q. In 1856 you have us charged with interest $763.13

A. Twelve cents.

Q. $763.12; which seems to have been made up of several small items which you have checked with a pencil on pages 14 and 15 of Exhibit 46. On page 15 of Exhibit 46 it appears that a balance of $28,474.11 was carried to transportation account for that year.

A. Yes.

Q. Wouldn't that dispose of that charge against us?

A. Yes sir.

Q. Now, in the same year 1856 you have us charged with $17,260.25 profit and loss; can you tell me readily what that is?

A. It is entered to the credit of profit and loss by machine shop account for difference of inventory between materials on hand, and balance of account, to-wit: Inventory $34,423.04; balance of

1739 machine shop account $17,355.29, leaving a balance of $17,067.75 carried to the credit of profit and loss account.

Q. Yes sir; then we need another item to make up your amount, which I think you will find right at the top of the account?

A. Yes sir, rent account $192.50.

Q. I will ask you if that profit and loss item, or the sum of these two items, as shown in profit and loss, does not appear in the secretary's report as printed for that year? On page 13 it is, Mr. Duy, of that report for that year.

A. Yes sir, it appears on the credit side of statement No. 3.

Q. Now, for the year 1857 on page 11 of Exhibit 45 you have us charged with interest $2,102.21.

A. Yes.

Q. I will ask you if the balance of interest account that year, being $16,949.77 was taken to transportation account?

A. Yes sir.

Q. That would dispose then with that item?

A. Yes sir.

Q. Now, in the same year you have us charged as receiving from profit and loss $4,857.12. Will you tell me what those items were? please.

A. It is E. & C. R. R. stock certificates for 75 shares for interest for stock in that company $3,750. and a fractional share $29.89, making $3,779.89; by machine shop, excess of material on hand overbalance of machine shop account $916.41; rent account $160.82

Q. Did you give the total of those items?

A. $4,857.12

1740 Q. I will ask you to state if they are *are* not shown in statement No. 3 of the secretary's report for that year?

A. They are.

Q. Mr. Duy, will you please look at Journal B 112, and see what that Evansville and Crawfordsville stock transaction was?

A. Journal B, page 112, December 30th, 1856; profit and loss credit by E. & C. Railroad stock, debit for certificate # 2142 for 75 shares of stock, being for interest for stock in that company $3,750.; fractional share 29,—$29.89; $3,789.89

Q. Anything further stated about it?

A. No sir; that is all; I can state from memory that this is accrued interest from stock that they held and they took new stock for it.

Q. Please look at the secretary's report for that year and see what he says.

A. It says the same thing; certificates of stock in Evansville & Crawfordsville Railroad Company for shares at par——

Q. (Interrupting.) Below that?

A. Received in payment of interest on $20,650. of stock in Evansville & Crawfordsville Railroad Company, said interest being payable in stock.

Whereupon, the hour of twelve o'clock and thirty minutes having arrived, the hearing was adjourned until two o'clock p. m.

1741 THURSDAY, *October* 19, 1899.

Afternoon session.

The parties met pursuant to adjournment.
Present the same as before recess.

The cross-examination of the witness GEORGE C. DUY, was resumed, as follows:

Questions by Mr. WILLIAMS:

Q. Mr. Duy, recurring to page 11 of Exhibit 45, you have us charged there for the year 1858 with interest $457.70. The interest account was transferred that year to transportation, wasn't it?
A. Yes sir.
Q. So that item should go out, should it not?
A. Yes, that is accounted for.
Q. Sir?
A. That is accounted for in that way.
Q. Now, you have us charged that year with $2,700.70 profit and loss. Can you tell me readily what items they are that go to make up that account?
A. They appear on profit and loss account, Exhibit 48, page 3.
Q. Give them to me, please, Mr. Duy.
A. Received for oil barrels $47.75; received from A. L. Murry $370.32; received from ditto for castings $281.09; received for old wheels $252.00; ditto $137.67; received from D. Wolf $443.98; received from Grover, Griswold & Co., and A. Holmes, $793.00; foreign work, balance transferred $374.89.
Q. Making a total of $2,700.70, does it, Mr. Duy?
1742 A. Yes sir.
Q. Now, the amount of these items, excluding the balance transferred from profit and loss, amounts to $2,325.81, doesn't it?
A. Yes sir.
Q. Please look in the secretary's statement, too, as it appears in the annual report for the year ending November 30th, 1858, and tell us if you find in there that item of $2,325.81?
A. Yes sir, I find it in statement No. 2 which I take to be the statement of the treasurer.
Q. It is headed general account, isn't it?
A. Yes sir; it starts with balance in the treasurer's hands and closes with balance in the treasurer's hands and it says, received from materials sold $2,325.81.
Q. Then on the next page I will ask you if you do not find in what you would properly call the profit and loss account an item $374.89 reported?
A. Yes sir.
Q. In that statement No. 2, Mr. Duy, besides that item received from materials sold there is also reported three other items, is there, for work done for other roads, rent and wood sold?
A. Yes sir.

Q. You haven't any account of them, have you?
A. Not yet.
Q. You don't know how they are disposed of?
A. No sir.
Q. If you will look though, you will see that the rent item of $331.88 is more than balanced by the rent on the other side of $516.88, don't you?
1743 A. Yes sir, I see that entry.
Q. And work done for other roads is embraced in the balance carried from profit and loss, don't you think?
A. I presume so, yes sir; wait a minute.
Q. Profit on work done in machine shop, and other roads, $374.89.
A. I think that is exactly the balance; there is a credit there of $1,716.38 and a debit of $1,388.60; that would be the balance that we would have transferred.
Q. The wood sold $29.83, do you find that apparently disposed of on the other side of the account?
A. There is a purchase of fuel $19,000.
Q. But if you should, Mr. Duy, upon looking at it find that there is nothing on account of these three last items there that would properly come as an earning for this year, please let me know will you not? I think myself they are disposed of, but if they are not I want to have it in.
A. Well, the reason we put them into this profit and loss earnings is that because on the journal these various items are charged to the treasurer and directly credited to profit and loss account.
Q. Now, on page 11 of that Exhibit 45 for the year 1859, you have us charged with interest $3,866.10. I will ask you if that interest account was not transferred that year to transportation account as it was in the previous year?
A. Yes sir.
Q. Then that item has already been accounted for in the transportation exhibits?
A. Yes sir.
Q. Profit and loss that year you have us charged with $821.48?
1744 A. Yes sir.
Q. I will ask you to state if you can quickly or easily, what that item is, what it is for?
A. The secretary in his statement No. 3 for that year gives credit for it, profit on work done in machine shops for other roads $821.48
Q. And that is the item you have charged us with?
A. Yes sir.
Q. Now for the year 1860, you have us charged with interest $47.20?
A. Yes.
Q. That interest account was transferred as it had been before that year to transportation account, wasn't it?
A. Yes sir.
Q. Was that item accounted for in the transportation?

A. Yes sir.

Q. So that disposes of that item? Profit and loss that year you have charged with $171.75, and that is for rent, is it not?

A. Yes sir.

Q. And it appears in the secretary's printed report for that year, does it not?

A. (Examining report.) $171.75 rents.

Q. Now, in 1861, on page 12 of this Exhibit 45, you have us charged with earnings from interest account $1,157.75?

A. Yes sir.

Q. That interest account was transferred to transportation that year, wasn't it?

A. Yes sir.

Q. And that item is accounted for in the transportation exhibits?

1745 A. It is accounted for there.

Q. Profit and loss you have us charged that year with $426.25?

A. Yes sir; that is two items.

Q. What are they, Mr. Duy?

A. Amount received for part of lot one Greencastle / this lot was bought in 1853 for $600 for water supply and charged to construction account, but the spring proved worthless / $350; by old furniture sold $76.25; making $426.25; which the secretary in his statement No. 3 for that year credited as by profit and loss $426.25.

Q. Now you have us charged that same year with surplus $7,367.50; will you please tell me what that is?

A. What year is it we are on?

Q. 1861.

A. That is interest on E. & C. Railroad Extension bonds?

Q. $7,367.50?

A. Yes sir.

Q. And that item does not appear in the interest account? Does it, Mr. Duy? That went to transportation?

A. No sir.

Q. And the secretary in his statement for that year on page 14 of the report for that year, gives those two items just as you have given them, does he not?

A. $7,367.50; yes sir.

Q. Now for 1862, you have us charged with interest, $20,176.91?

A. Yes.

Q. The balance of the interest account that year, Mr. Duy, was transferred to surplus account, wasn't it?

A. Yes sir.

1746 Q. We received more interest that year than we paid out?

A. Yes sir.

Q. And what was the balance transferred to surplus that year?

A. $4,832.53

Q. Now, you also on that same page 12 charge us for 1862 with surplus $8,423.?

A. Yes sir.

Q. The items going to make up that charge are found on page four of Exhibit 48, are they not, the first three items at the top of the credit side of profit and loss for that year?

A. They are on page three surplus account.

Q. Well, I know, but what I wanted to get at—no, I guess I was wrong about that. Surplus account that year, 1862, as appears on page 3 of Exhibit 47, is made up of a balance from profit and loss of $1,572.20, isn't it?

A. Yes sir, partly.

Q. Yes, in part; now the transfer of that balance from profit and loss to surplus would take care of an account for all of the items that went into profit and loss account that year, would they not?

A. Yes sir.

Q. Now, then will you please tell me where you get the item you charge us with in 1862 as being earnings from profit and loss of $6,797.70?

A. I get that from profit and loss account.

Q. It is made up of the three items on the credit side of that account, isn't it?

A. Yes sir.

Q. That is what they foot up?

1747 A. Page 4 of Exhibit 48.

Q. And yet they are taken care of, and repeated in the balance that is carried to surplus account, are they not?

A. I don't know.

Q. Well, they are the only three items on the credit side of that profit and loss account, aren't they?

A. Yes sir.

Q. And there are two items on the debit side?

A. Yes sir; that leaves a balance.

Q. That leaves a balance of $5,872. which was transferred to surplus account?

A. Yes sir.

Q. Then they must necessarily be included inthe surplus account?

A. They are accounted for.

Q. So that item of $6,977.70, profit and loss, should go out?

A. No, I think not, because in my profits from the surplus account I have not got them in.

Q. We will wait and see then.

A. Well I think we haven't; I will look and see; I have it in the surplus account, but I haven't got it in my statement of earnings, No. 45.

Q. You have us charged with surplus that year, 1862, with $8,423.?

A. Yes sir.

Q. Which is made up apparently of two items?

A. Yes sir.

Q. Interest on E. & C. Extension bonds $7,385.

A. Yes sir.

Q. And rent $1,038.?

1748 A. That is right.

Mr. KETCHAM: What exhibit is that on?

Mr. WILLIAMS: That is on Exhibit 47, page 3.

Q. Mr. Duy, if you were to take the aggregate of these four items on the credit side of surplus account, on page 3 of Exhibit 47, namely: By profit and loss $5,872.20; by interest on E. & C. Extension bonds $7,385; by rent $1.038; by interest and exchange $4,832.53; wouldn't that aggregate represent all of the earnings with which we ought to be charged outside of those which are accounted for in the transportation? The balance of interest account has gone into surplus account; the balance of profit and loss has gone into surplus account?

A. It don't come out exactle right?

Q. Well, I ask the question as an inquirer seeking light; I am not sure of it, but it seems to me that that ought to be right. Now, Mr. Duy, can you add anything to what appears there to explain the situation as you look at it?

A. If we give you the benefit of two debtor items on Exhibit 48, page 4, in the year 1862, amounting to $925.50, your proposition is correct.

Q. And the reason you make that calculation is that you are not sure that in accounting with the State the company would be entitled to take as a credit against the State losses that they sustained in the sale of some stock or bonds that they had?

A. Well, that was simply a suggestion in my mind, there-
1749 fore I gave the detailed items on both sides, and showed the net earnings, and also the losses, that it might be settled by the proper authority.

Q. Well, then, aside from the question of that loss on the sale of these securities, the amount that we should be charged with in 1862 as a total is $19,127.73?

A. Besides the amount in the interest account on the debit side which might possibly be a question.

Q. How do you mean, please?

A. Which was transferred to transportation account, we have you charged with $20,000. interest earnings of which we include $4,832.53 in this amount of $19,127.73; that would leave a difference of some fifteen thousand dollars of interest, which as a bookkeeping matter, is accounted for by the transfer to transportation account.

Q. Well, that is what I had in mind. But Mr. Duy, if I am not mistaken, there was no transfer of interest to transportation account that year?

A. Well, then I should modify that.

Mr. KETCHAM: It is in surplus account probably.

The WITNESS: No, it wasn't; it was expended; I should modify that by showing the amount of interest expended during the year.

Q. Well, you understand, don't you, that the interest account that year, instead of being transferred to transportation, as was usually

done, all went into surplus account by the transfer of that balance of $4,832.53?

A. I understand that the balance to surplus account,—
1750 the transfer of the balance to surplus account—as a bookkeeping matter accounted for all the items in the interest account both debit and credit. I don't want to say, if I understand the question, that this $19,127.73 embraces all the items that you might be chargeable with.

Q. No, I don't want you to say that.

A. No, I didn't suppose you did; that is why I qualified it.

Q. No; I only wanted you to explain as a bookkeeping matter that the transfer of that balance of $4,832.53 took with it all of the items in the interest account on both sides of the account.

A. Yes sir, that is correct.

Q. And that is the transfer from profit and loss to surplus account took care of all the items on both sides of profit and loss that were transferred to surplus account?

A. Yes sir, that is right.

Q. And that we find in surplus account two items which were not embraced either in the interest or profit and loss account, namely, interest on those E. & C. bonds, and rent $1,036?

A. Yes sir, that is right.

Q. And it was the sum total of the balance from interest account, the balance from profit and loss, the Evansville & Crawfordsville interest and the rent that I asked you to give me the total of?

A. Yes sir.

Q. And that you gave me as $19,127.73, which without asking you for the moment to pass any opinion about, I will on my side
1751 of the case insert or take as the amount of earnings outside of transportation with which we are chargeable for 1862 instead of the total amount of $35,397.61 with which you have us charged in Exhibit 45. Mr. Duy, will you please look at the secretary's printed statement No. 2, as it appears in the annual report for that year?

A. Yes sir; for 1862 is it?

Q. Have you the report?

A. Yes sir.

Q. It is on page 17 of that report for that year.

A. Page 17, yes sir.

Q. You have it, have you?

A. Yes sir.

Q. Now, don't you find there under the head of receipts from other sources, interest on bills receivable and judgments, $20,087.76?

A. Yes sir.

Q. And don't you find there on the other side of that account interest and exchange $15,255.23?

A. Yes sir.

Q. Showing that he had taken into account there the difference between the amount we received and what we paid out?

A. Yes sir.

Q. Now, don't you find also that he has returned also in receipts from other sources, interest on Evansville & Crawfordsville extension bonds $7,385?

A. Yes sir.

Q. And don't you find also that he has returned rent $1,038?

A. Yes sir.

Q. And he also has returned wood sold, and work done in machine shop, $4,047.20?

1752 A. Yes sir.

Q. Which is accounted for how, do you know?

A. I think he gets that from [illegible]e other source, I don't know.

Q. Well, now, maybe I can [illegible]n you.

A. I don't think we will find it on the books. He has an item of wood sold, and work done which do not appear on the books so far as I could find.

Q. The probability is it is taken up from some other account isn't it?

A. Well, it is mixed in with the machine shop account somehow, but we didn't have the machine shop books, and could not arrive at it in any way.

Q. If, upon further investigation, Mr. Duy, you find that you think we are chargeable with anything on account of that item of wood, etc. please let me know. It seems we can account for it now, Mr. Duy, in the following manner, to-wit——

A. (Interrupting.) I have got the same amount of that charge there.

Q. Mr. Duy, I find that that item of $5,872.20 which was transferred from profit and loss account to surplus represents the items which we have already had under consideration, namely: by fuel account, wood sold in 1862 $4,366.17; foreign work and materials and profit on work 1862, $606.53; mail service, amount withheld by Post Office Department, first quarter of 1856, $1,825. Now, the aggregate of those three items being credited by the loss on the bonds and preferred stock about which we have already spoken carries those items into surplus account by the transfer of that balance of $5,872.20.

1753 A. Yes sir, and the aggregate of those credits on the secretary's statement equal $19,127.73 after deducting the amount of interest expended.

Q. So that balances with our statement. Now, Mr. Duy, you have us charged in the year 1863 on page 12 of Exhibit 45, with $104 on account of interest. I will call your attention to the fact that on Exhibit 46, page 22, it appears that the balance of interest account for the year 1863 amounting to $8,785.22 was transferred to surplus?

A. Yes sir.

Q. Won't that item then be accounted for in the surplus account?

A. Yes sir.

Q. Please look at page 4 of Exhibit 48, and see if the profit and

loss account for that year 1863, the balance of the profit and loss account for that year, was not transferred to surplus?

A. Yes sir.

Q. Then that item will be accounted for in the surplus account?

A. Yes sir; as a matter of bookkeeping.

Q. Now you have us charged that year, 1863, with surplus $11,764. On page 3 of Exhibit 47, being itemized surplus account, I find a credit there to surplus of these three items: $879, rent account; $3,500, E. & C. railroad bonds interest,—no, C. & I. railroad bonds interest; $7,385 E. & C. railroad bonds interest.

A. Yes sir.

Q. And these three items make up the $11,764 with which you have charged us on account of surplus?

A. Yes sir.

1754 Q. Now, the interest and the profit and loss account both having been transferred to surplus, and being taken care of in surplus account by reason of the transfer of their respective balances, should not $11,764, be the amount chargeable to us that year, as a matter of bookkeeping?

A. Yes sir.

Q. Instead of $13,594.50 with which you have us charged?

A. That is right. No, I don't think that $1,726 is accounted for.

Q. Which, Mr. Duy?

A. Profit and loss. Well, let us see, I don't know.

Q. That $1,726.50 appears on the credit side of profit and loss account as being amount realized from wood sold during the year, and profit and loss account that year has a single debit just as it had that single credit of loss on sale of St. Louis, Alton & Terre Haute bonds taken at par by this company, and sold at a discount. Now, so far as bookkeeping is concerned, it is taken care of?

A. That seems to take care of it.

Q. As to whether or not we are entitled to credit for the loss on those bonds as against the State, that I am not asking you about.

A. I notice that the secretary in statement No. 2 credits that $1,726.50 as earnings. I was looking for something to balance it, but I don't find it. That charge of $6,651.85 to profit and loss is for an absolute loss.

Q. An absolute loss, yes sir.

A. And that would stand to the debit of profit and loss account.

1755 Q. As a matter of bookkeeping?

A. Well, it would any way because it is charged directly to profit and loss account. Now he credits to that side—suppose there hadn't been any wood sold, he would have transferred the whole of that loss; but there being wood sold, it operates as a credit. But I dont't think it ought to. It wouldn't show the facts.

Q. Well, Mr. Duy, if we were to add that as a credit, as a charge against us for wood sold, then we ought to take and debit surplus with the whole amount of that loss?

A. That is what I am looking for.

Q. And we reached the same result by debiting surplus with the difference between the wood sold, and the total loss.

Mr. CLELAND: That is right.

Q. I have no doubt we could figure it out after a while, but the trouble is where the accounts are differently stated in making them jibe. I think the same figures are in there all the same.

A. There is another item there.

Q. Yes, I notice that; that must be taken up, unquestionably.

A. I don't see it here.

Q. No, you don't see it on that general account, statement No. 27.

A. Well, I don't see it on my books. There is an item of interest on St. Louis, Alton & Terre Haute Railroad bonds $2,204.68 I don't see where I got that. That may be in my interest account.

1756 Q. No, it is not on your interest account.

A. No, I don't see it there.

Q. We will put that one side for the present, please, that item of interest on St. Louis, Alton & Terre Haute bonds $2,204.68, as it appears in the treasurer's printed statement for that year, and ascertain hereafter whether or not that should be charged as an earning for that year.

Mr. KETCHAM: What was the amount?

The WITNESS: $2,204.68.

Mr. KETCHAM: On Exhibit 17, Mr. Duy, if you will look at page 5, you will find May interest on bonds held by this company $2,204.68.

Mr. HAWKINS: What year?

Mr. KETCHAM: For the year 1863. No, that is 1862. Then there is a debit there of $6,651.85 but that seems to be in 1862 instead of 1863. We are on 1863, are we?

Mr. HAWKINS: Yes, we are on 1863.

Mr. KETCHAM: See if you get any explanation of that in the journal, page 108. It is put into the same entry with $6,651.85.

Mr. WILLIAMS: That Alton account is a little bit mixed up. We sued them and took judgment for it, and there was interest before judgment, and there was interest after judgment, and then we accepted payment of the judgment in bonds, and there was an account of interest on bonds; and so it is a kind of a mixed up account.

Q. What exhibit have you now in your hands, Mr. Duy?

A. Exhibit 17.

1757 Q. And what does it purport to be?

A. Statement of transactions with the St. Louis, Alton & Terre Haute Railroad Company from November 1857 to December 1863.

Q. What in a general way was that transaction?

A. That was account with the railroad company; notes were taken, and the notes were merged in judgments, and interest was added to those judgments. In November 1862 bonds were taken,

bonds and scrip were taken amounting to $94,552.59, and that is carried on the ledger to an account, St. Louis, Alton & Terre Haute Railroad second mortgage bonds, and that account is charged with bonds $94,552.59 in November 1862. In 1863 that account is credited October 12th, Journal C, page 83, by amount deposited with Farmers' L. & T. Co., New York, by Corning & Sons, agents for sale of bonds, $54,290.32. October 24th, page 88, by amount deposited by same, $31,405.74, December 1st, page 108, by May interest on bonds held by this company, $2,204.68. By profit and loss, amount of loss on sale of bonds taken at par and sold at a discount, $6,651.85, making $94,552.59.

Q. And that transfer of the loss to profit and loss appears on page 4 of Exhibit 48 for the year 1863, and is the item of loss on bonds about which we were talking just now when we were discussing whether wood sold that year should be included as a credit?

A. Yes sir.

Q. Now, Mr. Mr. Duy, on page 12 of Exhibit 45 you have us charged with $6,911.76 of interest for the year 1864?

A. Yes sir.

Q. Now, please, look at page 23 of Exhibit 46, and tell me

1758 if the full balance of interest account for the year 1864, amounting to $1,218.92, was not transferred to surplus account?

A. Credited to surplus account.

Q. I mean credited to surplus account.

A. Credited to surplus account; yes sir.

Q. So that that item of interest that you have charged on Exhibit 45 will be taken care of in the surplus account, won't it?

A. Yes.

Q. Now, on that same page 12, you have us charged for 1864 with $18,383.57 as coming from profit and loss?

A. Yes sir.

Q. I wish you would look on page 4 of Exhibit 48 and see if the full balance of profit and loss account for the year, amounting to $14,715.34, was not transferred also to surplus?

A. Yes sir.

Q. Well, then, all of the items contained on both sides of the profit and loss account for that year will be taken care of in the surplus account, won't they?

A. Yes sir.

Q. On that same page 12 of Exhibit 45 you have us charged for the year 1864 with surplus $25,286.04?

A. Yes.

Q. I have been trying to discover, Mr. Duy, whether that item of $25,286.04, which you charge as surplus, is all that should be charged against us as per the books on account of earnings outside of transportation for the year 1864. If you will turn to the secretary's report for the year ending November 30th, 1864, on page 8; do you have it?

1759 A. Yes sir.

Q. Well, now, under the head of receipts from other sources, he charges himself, or charges the company if you please, with interest on United States bonds $6,000; with interest on United States certificates $1,574.98: premium on gold sold $6,766.24; interest on five per cent. Treasury notes $713.88; interest on deposit $1,415.07; interest on bills receivable $1,984.38; interest on Evansville & Crawfordsville Extension bonds $7,385; interest on Cincinnati & Indianapolis Railroad bonds $3,500; and for rent $1,099. Now, the aggregate of those items make $30,438.55, an excess of $5,152.51 over and above the surplus you charge us with on page 12 of Exhibit 45. Now, if you will turn to Exhibit 46, being your itemized interest account, page 22, you will find the following items to the credit of interest in that account: Farmers' Loan & Trust Company, sale of U. S. certificates and gold $1,964.98; balance interest account to May 16, to Farmers' Loan & Trust Company $489.27. And on page 23 you will find: 107 days' interest on $18,000 five per cent. Treasury notes $713.85. On the same page you will find: Bills receivable. Interest on Indiana & Cincinnati Railroad Company note $817.50; interest on bill of engine $18,223.90, to November 25th, 1864, $817.04; and on note of $30,421.22 from November 25th to February 3rd $349.84. Those three last items making an aggregate of $1,984.38. Now, the aggregate of those items on the interest account to which I have just called your attention, is $1,552.51, and that should, I think, be deducted

1760 from the aggregate of interest appearing on the secretary's report, in as much as they have been taken care of in the interest account by the transfer of the balance of the account to surplus, and if $1,552.51 be deducted from the aggregate of earnings from all sources in the shape of interest and premium and rent it would leave the balance with which you charge us for surplus in 1864, namely, $25,286.04 In other words, taking the statement of earnings from other sources as given by the secretary, and taking your exhibits, and making allowance for the interest included in interest account, and which was transferred to surplus, the balance of the secretary's statement of earnings from other sources, after making a deduction of that interest included in that interest account, exactly agrees with your statement of surplus with which we should be charged that year?

A. That agrees with my statement of surplus.

Q. But think perhaps there should be something more added to that on account of profit and loss items?

A. I think the profit and loss items should go in.

Q. Well, we will pass that then, until we have time to look into it. Now, on page 12 of Exhibit 45 you have us charged for the year 1865 with interest $5,582.23 I will ask you to look on page 23 of Exhibit 46 and tell me if the balance of interest account for this year was not transferred to surplus? You will find it right at the bottom.

A. Charged to surplus and credited to interest.

Q. So that all of the items appearing on the interest account will be taken care of when we come to the surplus?

A. Yes sir.

1761 Q. Now that same year, 1865, you have us charged on page 12 of Exhibit 45 with $20,285.84 on account of surplus. If you look at the bottom of page 4 of Exhibit 47 you will find there five items from which, judging by the pencil marks on the margin, you have obtained that charge of $20,285.84; those five items are: Interest on U. S. 5/20's $8,327.84; interest on Evansville & Crawfordsville Railroad extention bonds $7,385; Cincinnati & Indianapolis bonds $3,500; rent account $1,093?

A. That is all. That makes it $20,285.84.

Q. Well then, it was only four items?

A. Four items.

Q. You had a check mark there against the interest and exchange item of $505; and it is $20,285.84 without that?

A. Yes sir; now you want credit for $544.07 balance of interest account instead of $5,582.23, which we have, which is the gross earnings from interest account.

Q. Now, will you please add for me $544.07 on account of interest and exchange to $20,285.84, and give me the result?

A. $20,829.91.

Q. Have you compared that amount with the secretary's report of earnings from other sources for 1865?

A. No, not exactly; I was looking at the interest question.

Q. Well, what result have you?

A. I have the whole now.

Q. Will you kindly give us the result, Mr. Duy?

A. The secretary reports interest on United States bonds

1762 $6,000 and premium on gold $2,307.84, which balances our statement,—the first item in our statement on page 4 of Exhibit 47. He also reports $7,385 E. & C. railroad interest, and $3,500 C. & I. railroad, and $1,093 rent; and those items make up the $20,285.84 on our exhibit as coming from surplus. He reports as received——

Mr. KETCHAM: Mr. Duy, isn't that ten ninety-nine instead of ninety-three?

The WITNESS: No, it is ninety-three.

A. (Continuing.) He also reports as received from interest on certificates of indebtedness $2,021.61, and interest on deposits $3,560.72, making but 12 cents I think it is——

Q. (Interrupting.) It is seventy-two here on the report.

A. Yes; that makes $5,582.33. He reports as paid out $5,038.26 interest, and the difference of that would be $544.07 to the credit of interest account, which is the balance carried over to profit and loss.

Q. Many thanks. So the proper amount chargeable that year the way we have stated it is $20,829.91?

A. $20,829.91.

Whereupon, the hour of 4:30 p. m. having arrived, the hearing was adjourned until Wednesday, October 25th, 1899, at 2:00 o'clock p. m., unless sooner convened at the call of the master.

1763 THURSDAY, *October 27th*, 1899—10 o'clock a. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, with the exception of Ferdinand Winter and Judge Robert S. Taylor of counsel for plaintiff, and Lawrence Maxwell of counsel for defendant.

The cross-examination of the witness, GEORGE C. DUY, was resumed, as follows:

Questions by Mr. JOHN G. WILLIAMS:

Q. Mr. Duy, at our last session, we had under consideration Exhibit No. 45, being itemized statements of earnings, other than transportation, from interest, profit and loss and surplus accounts, and we did some figuring on your statements of those earnings for the year 1864, as shown on page 12 of that exhibit. We found that you had as an earning from surplus for that year $25,286.04, and that the question arose as to whether that should be all charged for that year, in as much as the interest account and profit and loss account had both been transferred to surplus. It was suggested as a doubt in my mind as to whether or not the transfer from profit and loss to surplus should not be added to the $25,286.04; and I wish to have a little more light thrown on that item, so as to ascertain if possible whether or not it should properly be regarded as an earning that year. I will call your attention to page 4 of Exhibit 48, being the itemized profit and loss account.

1764 You will there find that the first two items credited to profit and loss for that year consist of twenty house cars, apparently sold to the United States military road, and five flat cars, sold to the United States military road. The third item is for an engine lathe sold to the Government, and the fourth is for wood sold—the fourth is for wood sold and profit on work in shop. The only debits to profit and loss in that year are a subscription to the bounty fund of a thousand dollars and work on five flat cars sold to the Government, $2,668.23, and the balance, being $14,715.34 is carried to the credit of surplus account for that year. Now, can you tell me, Mr. Duy, to what other account was charged this transaction of the sale of the cars and the lathe to the Government? Was there an equipment account on the ledger that year against which these cars were charged, or to which the proceeds of them was credited, or was it simply a cash transaction, between cash and profit and loss? The journal entry is on page 186. What two accounts does it mention?

A. United States military road, debtor to profit and loss, Journal C, page 186.

Q. Then is it the same on page 223?

A. The next entry to treasurer is charged and the military road is credited with cash.

Q. Then it was a cash transaction apparently?

A. There is a reference here to page 108. What other page did you refer to?

Q. Page 223. Did you find anything on page 108?

A. No sir, nothing that I can connect with this. United States military road to profit and loss for five cars delivered to Gov-
1765 ernment agent, $875. each, $4.375. The next entry charges the treasurer and credits the military road account with cash, or at least charges the account over to the treasurer.

Q. Mr. Day, was there a ledger account at that time called "Equipment"?

A. No sir, I think not. There is no such account indexed.

Q. Or "Cars" or anything of that kind? where an account of rolling stock would be kept?

A. No.

Q. Then it would seem that the proceeds of that sale of these cars came to the company in the shape of cash, and no entry was made diminishing the equipment account or the construction account in any way?

A. No sir.

Q. Will you please turn to the secretary's report for the year ending November 30th, 1864, which you will find on page 8 of the printed report for that year, and give me what the secretary reports for the year under the head of "Receipts from other sources," not including in your answer the interest that follows below the first two items there.

A. For cars and lathe sold, $15,203.36; for wood sold $511.98.

Q. Now, turning again to page 4, of Exhibit 48, I will ask you if the sum of the items credited to profit and loss there, for cars and lathe sold, less the amount debited for work on the flat cars of $2,668.23, does not give you the amount that the secretary reports as earnings from cars and lathe sold?

A. Yes sir.

Q. And the other item of $511.98 for wood sold also appears, does it not?

1766 A. Yes sir.

Q. In that profit and loss account?

A. Yes sir.

Q. In stating those two items he has given the balance to credit of profit and loss, that is, with the exception of the item of $1,000. subscribed to the bounty fund, has he not?

A. Yes sir.

Q. I will ask you if you can tell me readily if in this report of the secretary he has not taken up that item of one thousand dollars subscription to the bounty fund on the other side of his account under the head of "Additional expenditures," on page 9? You see right at the top of that page he does there credit receipts brought forward, and then immediately under it, expenditures for the year,

operating expenses, Government tax on receipts, additional expenditures?

A. Yes sir, I see that.

Q. Now, can you tell me readily whether or not that one thousand dollars item, being a subscription to the bounty fund, has been taken by the treasurer into that statement of additional expenditures for that year?

A. It is included in that sum. I find it on page 11.

Q. So that the effect of the secretary's statement in dealing with that profit and loss account is to transfer a balance to the credit of surplus account of $14,715.34, is it not?

A. Yes sir.

Q. Now, under those circumstances, don't you think—as a matter of bookkeeping, I mean—that that balance transferred from
1767 profit and loss account of $14,715.34 should be added to the item charged on account of surplus that year of $25,286.04. in order to ascertain the receipts from other sources that year?

A. Yes, I so have it, except that I have in my statement $18,383.57.

Q. Yes, but you had us charged with that and also with interest of $6,911.76.

A. That, as a matter of bookkeeping, you eliminated the other day.

Q. Now, the matter of profit and loss, standing upon the same footing, and that transfer appearing in surplus, should be transferred, should it not, as an earning for that year, the balance of $14,715.34?

A. Yes, instead of eighteen thousand dollars as I have it. I have so made a memorandum on my statement.

Q. So that then the earnings from sources other than transportation that year may be stated as profit and loss of $14,715.34 plus the items in surplus account, $25,286.04?

A. Yes sir.

Q. Making a total of what, please?

A. $43,669.61.

Q. That is wrong. You have included the interest in there.

A. I added the whole business.

Mr. KETCHAM: He has included the one thousand dollars and the twenty-six hundred dollars.

The WITNESS: It should be $40,001.38.

Q. That is what we have it. We got through, before the adjournment last time, with the year 1865, so now we will go to the
1768 year 1866. Your statement of earnings from sources other than transportation for that year, as shown on page 12 of Exhibit 45, charged us first with interest, $8,306.51. I will ask you if the balance from interest that year was not a credit balance of $6,286.26, and if it was not transferred to the credit of surplus that year?

A. Yes sir.

Q. As shown on page 5 of Exhibit 47?

A. Yes sir.

Q. You also charged us that year with profit and loss, $4,359.76. Was there not a credit balance to that amount on profit and loss that year which was also transferred to the credit side of surplus account?

A. Yes sir.

Q. That also appears on page 5 of your Exhibit 47, does it not?

A. Yes sir.

Q. Now, as a third item for that year you have us charged with an amount coming from surplus of $21,310.50 Will you please tell me where you got that item?

A. I got that on page 5 of Exhibit 47, in the year 1866, of the following items: Interest, United States 5:20 bonds, $8,182.50; E. & C. Railroad extension bonds, $7,385; Cincinnati & Indianapolis Railroad bonds, $3,500; Union Star Line stock, $1,000; rents received, $1,243.

Q. And those items you have just given make up the single item of $21,310.50, do they?

A. Yes sir.

Q. Now, those items embrace everything on the credit side of surplus account that year, don't they, except balance brought
1769 forward respectively from interest and exchange and profit and loss, and the balance from transportation account?

A. Yes sir.

Q. If you add to that amount you have charged us with as coming from surplus, namely: $21,310.50, the balance as brought forward from interest and exchange, $6,286.26 and from profit and loss, $4.359.76, what will it give you?

A. $31,956.20

Q. You said just noe that the secretary's printed report for that year gave all of the items you have just mentioned except the one thousand dollars from Union Star Line stock?

A. Yes sir.

Q. Now, I will ask you if that item of one thousand dollars was not included in the secretary's statement in interest on certificates of indebtedness, compound interest notes, and so forth?

A. That is probably true, because there is a difference, a credit to interest account of one thousand dollars in the secretary's report, and the balance carried over from profit and loss.

Q. He has it in there in his account, undoubtedly, under some head, in as much as the balance agrees.

A. Yes sir, run together.

Q. Now, as a matter of bookkeeping should not the earnings for the year 1866, be stated then in the way we have just stated them, to produce the amount of $31,956.52, instead of $33,976.77 with which you have charged us?

A. Yes sir.

Q. For the year 1867, on page 12 of Exhibit 45, you have
1770 us charged, first, with an item of interest, $5,795.11. Was that not a credit balance which was transferred to the credit of surplus that year? And appears on page 6 of Exhibit 47?

A. Yes sir, it is.

Q. You have us also charged with profit and loss $3,169.22 Was not that a credit balance also, that is carried to the credit of surplus and appears in surplus account for that year?

A. Yes sir.

Q. You have us charged with surplus $50,061.96 How did you obtain that amount? (After a pause) I can help you if you don't see it right away. You took all the items on the credit side of surplus that year except the balances brought forward from profit and loss and interest and exchange and the transportation balance, didn't you?

A. Yes sir, that makes it.

Q. So your statement for the year 1867 does not include, as in some other years, or rather, does not take into the account, the interest from profit and loss account twice?

A. No sir.

Q. Now, you have simply treated those balances as separate and apart, and then taken the other items in the year, surplus separate from them?

A. Yes sir.

Q. And the total you get is correct on the basis we took for the last year?

A. Yes sir.

Q. Now, will you please look at the secretary's report for that year and tell me whether or not his statement of earnings
1771 from other sources gives also an amount of $59,026.29?

A. Yes sir, it does.

Q. For the year 1868, on page 12 of Exhibit 45, you have us charged, first, with interest, $2,081.50. That is the amount of interest transferred to the credit side of surplus for that year, is it not, as shown on page 6 of Exhibit 47?

A. Yes sir.

Q. You also have us charged that year with profit and loss $18,178.35. The balance that year in profit and loss was to the debit side of the account, was it not?

A. Yes sir.

Q. And it was transferred to the debit side of surplus, was it not?

A. Yes.

Q. $2,277.33, on page 7 of Exhibit 47?

A. Yes.

Q. Can you tell me how you got those items, aggregating $18,178.35? Maybe I can help you by the check marks that appear on this exhibit.

A. Probably so.

Q. Did you take those items appearing in profit and loss, Exhibit 48, beginning on page 6, T. H. & I. stock, issued for bonds supposed to be lost, $5,000?

A. Yes sir.

Q. One coach sold to St. Louis, Vandalia & Terre Haute railroad, $3,700?

A. Yes sir.

Q. One passenger car and one baggage car sold the same railroad, $3,400?

A. Yes sir.

1772 Q. Error in payment of dividend, corrected by the Farmers' Loan and Trust Company, $25.?

Mr. KETCHAM: Where are you getting that from?

Mr. WILLIAMS: Page 7 of profit and loss account.

Mr. KETCHAM: You said page 6.

Mr. WILLIAMS: I said beginning on page 6.

Q. Amount of coupons on bonds, supposed to be lost, $5,008.85?

A. Yes sir.

Q. And at the top of page 8, cross tie account, $1,044.50?

A. Yes sir, that is in.

Q. Is that the way you got it, by the addition of those items?

A. Yes sir, that is the way I got it. Now, if you will allow me to look at that cross tie account—I am doubtful about that item (after referring) That is right, I think.

Q. That same year you had us charged with surplus $61,117.09 You obtained that, did you not, by taking all of the credit items in the surplus account that year except the balance transferred from interest account, and the balance from transportation account?

A. Yes sir.

Q. You have us charged already in the first item with that balance from interest account, of $2,081 50?

A. Yes sir.

Q. Your total for that year is $81,376.94?

A. Yes sir.

Q. Please look at the secretary's report for that year and state whether that agrees with the secretary's report. It does agree,

1773 does it?

A. No sir.

Q. What is the amount that the secretary reports as earnings from other sources?

A. $85,379.99 is the total.

Q. What is the excess reported by him over that charged by you?

A. One item is——

Q. No, the total excess.

A. $4,003.05

Q. We will see if we can explain that difference. The secretary reports dividend on stocks, $51,251.55?

A. Yes sir.

Q. Whereas your surplus account reports it $48,404 even. The difference there is $2,547.55, is it not?

A. Yes sir.

Q. I will ask you if that difference does not represent the tax on the dividend and is not included in the other side of the secretary's account where he charges Government tax on dividends, $12,556.70?

A. Yes sir.

Q. So that accounts for that much of the difference, does it not?
A. Yes sir, that ought to be in as earnings, too.
Q. Is that as a bookkeeper, or otherwise?
A. The entry, if I recollect it, says it was that much dividend retained—I think the entry is that much tax retained.
Q. The company only received net $48,401; it was on the stock that it owned in itself?
A. I understand that, and they only paid out, as I understand the entries, they only paid out $12,556.70 less that amount.
1774 Q. No sir, that is what I asked you—if it was not included in that amount.
A. Yes.
Q. They had to pay the tax on the dividend that they drew on their own stock, just as much as they would on anybody else's dividend?
A. Yes sir, and therefore——
Q. And that $12,556.70 is the total Government tax on the total dividend?
A. Yes sir.
Q. Now, of that total dividend they received $48,404. credited to surplus on page 6?
A. Yes sir.
Q. Of Exhibit 47?
A. Yes sir, and they also retained that amount of tax which they charged out.
Q. I will ask you if on page 7 of Exhibit 47, surplus account is not debited with $2,547.55, as Government tax paid on dividend, T. H. & I. dividend on stock?
A. Surplus account is credited.
Q. It is credited, I believe. That is what puzzled me the other day. I see there is a credit comes in there is there not?
A. Yes sir.
Q. It is credited to surplus?
A. Yes sir.
Q. That amount?
A. Yes sir.
Q. Instead of being debited to surplus?
A. Yes sir.
Q. So I could not understand it. That explains one of my worries. I could not understand how he did that. I did not
1775 notice that he had slipped in a credit item there, or rather, he had it in there with the debit items.
A. Yes sir, just after the debit it slips in there.
Q. If I had looked a little bit more closely I could have seen that the balance into surplus account was increased over and above what the balance was above there, but I didn't do that in looking at that account.
A. It goes in to make up his fifty-one thousand dollars credit. It should be added to ours.

Q. In making up your statements you overlooked that $2,547.55, too, didn't you?

A. Yes sir, I overlooked that, but left out purposely the twenty-five hundred dollars on the stock.

Q. I noticed you left out the twenty-five hundred dollars on the stock.

A. Yes sir.

Q. Now, the secretary has charged in two items the following amounts: Interest on bonds, $11,395.09

A. Yes.

Q. And interest on deposits, $1931.50

A. Yes sir.

Q. Now, these two items make up $13,326.59, do they not?

A. $13,326.59

Q. Now, the items of interest on bonds and the interest and exchange account transferred to the credit of surplus as they appear on page 6 of Exhibit 47, make $13,301.59, do they not?

A. $13,301.59

Q. The difference between that amount and the amount given by the secretary is $25, is it not?

A. Yes sir.

1776 Q. And that is represented by the item of $25 credited on profit and loss for error on C. B. Wright's dividend in 1856, is it not?

A. Yes sir.

Q. That item of $25 appears on page 7 of the profit and loss account, Exhibit 48. Now, the secretary has charged seventy-one hundred dollars for cars sold, has he not?

A. Yes sir.

Q. And so have you, on the profit and loss account, in the two items of $3,700 and $3,400?

A. Yes sir.

Q. The secretary charged eleven hundred and ninety-three dollars for rents received, and that item appears on page 6 of Exhibit 47 to the credit of surplus account, does it not?

A. Yes sir.

Q. The secretary has bond account credited with $7,500?

A. Yes sir.

Q. That represents the transaction in issuing stock for bonds supposed to be lost, does it not?

A. Yes sir.

Q. Appearing on page 6 of profit and loss account, Exhibit 48?

A. Yes sir.

Q. Then, he also has coupon account charged with five thousand and eight dollars and eighty-five cents, which appears on page 7 of Exhibit 48, profit and loss account and represents the coupons that were attached to the bonds, supposed to be lost?

A. Yes sir.

Q. He reports that as an earning?

1777 A. Yes sir, that is right.

Q. You think that is right?
A. Oh, that is right; that money had been credited to coupon account and charged out against the earnings, and they put it back again.
Q. So that it is a proper entry?
A. Yes sir.
Q. Then, it would seem, would it not, that the earnings from other sources for that year should be $85,379.99, as reported by the secretary rather than $81,376.94, as made up by you?
A. Well, I think there ought to be a little more than that yet. That is what I was trying to make out a while ago.
Q. If you can suggest any other item, Mr. Duy, I will be glad to have you do it. I could not find any other myself and I had some doubts about that coupon business but, if it had already been charged one way, of course it ought to come back.
A. I think the difference is that $1,044.50 cross ties. I don't think it got in there at all. The secretary didn't put it in his statement.
Q. It doubtless is, but you will notice that—no, the secretary didn't put it in his statement, but you will notice that there is a large debit in profit and loss account that year to the cross tie account, namely: A debit of $10,376. and that credit to profit and loss by cross tie account is the balance of that account on December 1st, 1867, which he transferred, just as he did several others, to material account.
A. No. That $1,044.50, I think is different, I think that is
1778 on a different footing. That is what I was looking at a while ago.
Q. Well, if it is let us find it out.
A. That is what I was looking at the book for a while ago.
Q. It is Journal D, page 234.
A. Here is the entry, Journal D, page 234.
Q. Just read it, please.
A. Cross ties to profit and loss, the following ties on hand December 1st, 1867, to-wit: Thirty-six hundred ties at twenty-nine cents each, $1,044.50
Q. Well, what was the balance on the cross tie account that year?
A. This year—1868?
Q. No, the previous year, 1867.
A. November 30th, 1867, cross tie account is closed by a charge to repairs of road, $10,741.50
Q. There was no balance there then?
A. No balance. And immediately under this entry, cross ties to profit and loss, appears the transfer of the balance of 1868, $10,376. That is the balance of the account carried to 1869.
Q. It is possible then that that should be added, that item of cross ties, $1,044.50, should be added to the secretary's statement of $85,379.99. Now, for the year 1869, on page 12 of Exhibit 45, you have us charged with an earning that year of interest $4,145.10
A. Yes sir.

Q. The credit balance that year on interest and exchange account was $1,857.25, was it not?

A. Yes sir, that is correct; that is what it should be.

Q. And went to the credit side of surplus account, did it not?

A. Yes sir. Our statement is wrong.

1779 Q. You have us also charged that year with profit and loss, $11,216.?

A. Right.

Q. The balance to profit and loss that year was a credit balance, was it not, amounting to $24,408.09, and went to the credit of surplus account that year, did it not?

A. Yes sir, where do you get that amount?

Q. On page 8, Exhibit 47, the last item on the credit side of the surplus account.

A. Yes, $24,408.09

Q. That is right, is it?

A. Yes sir.

Q. Now, you have us charged that year, 1869, with surplus, $61,908 11

A. Yes sir.

Q. I will ask you to tell me of what items that amount is made up?

A. Interest, City of Evansville bonds, $3,500; interest, St. Louis, Vandalia & T. H. second mortgage, $7,000; ditto first mortgage, $140; inerest E. & C. Extension bonds, $7,385; interest, C & I. R. R. bonds, $531.61; interest, Union Star Line stock $300; interest, T. H. & I. railroad, $41,832; Crown Hill Cemetery lots, $19.50; rents $1,200;

Q. Those items make $61,908.11?

A. Yes sir.

Q. And they include, do they not, every item to the credit of surplus account that year, except the balance transferred from interest and exchange account, the balance transferred from transportation account and the balance from profit and loss account?

A. Yes sir.

1780 Q. The total amount you have us charged with for that year of earnings, as shown by this Exhibit 45, is $77,313.21? Please look at the secretary's printed statement for that year and tell me what he reports as earnings from sources other than transportation for that year?

A. $88,173.45

Q. And excess over your exhibit of how much?

A. $10,860.24

Q. And the secretary reports dividends on stocks $42,132, does he not?

A. Yes sir.

Q. And you report the same amount on page 7 of Exhibit 45 in two items, do you not? Union Star Line stock $300, and T. H. & I. R. R. stock $41,832?

A. Yes sir.

Q. The secretary reports interest on bonds $20,382.86

A. Yes sir.

Q. The interest on bonds received that year as shown by the credit side of surplus account on page 7 of Exhibit 47, does not amount to that much, does it?

A. No sir.

Q. It only amounts to $18,556.61, does it not?

A. Yes sir.

Q. And that is $1,826.25 less than the secretary reports as interest on bonds?

A. Yes sir, and that was interest on C. & I. bonds sold.

Q. They made an issue of bonds that year, didn't they?

A. No sir, it was C. & I. bonds. It was on C. & I. bonds sold.

Q. That account appears on page 10, of profit and loss Exhibit No. 48, does it not?

1781 A. The difference will be shown on pages 9 and 10.

Q. Yes sir, but I am only asking about page 10 first. On page 9 of this Exhibit 47 he credits profit and loss with ten thousand dollars on account of those bonds, that being the amount which they had been previously reduced in value.

A. As charged to profit and loss before.

Q. There was a reduction of twenty per cent. in the valuation of those securities?

A. Yes sir.

Q. There was fifty thousand dollars of them?

A. Yes sir.

Q. That had been debited to profit and loss account before?

A. Yes sir.

Q. That is ten thousand dollars?

A. Yes sir.

Q. Now, he credits profit and loss account again with that twenty per cent. reduction?

A. Yes.

Q. And debits profit and loss with the difference between the face value of the bonds and the net amount realized for them?

A. Yes sir, the actual loss.

Q. Now, the actual loss as shown on the debit side of profit and loss account is $8,173.75, is it not?

A. Yes sir.

Q. That taken from $10,000 credited to profit and loss leaves you this difference of $1,826.25?

A. Yes sir.

Q. The secretary accounts for interest on deposits of $1,876.75?

A. That is the balance transferred from interest account.

1782 Q. Not quite, to that you will have to add $19.50 from Crown Hill Cemetery lots.

A. Yes sir.

Q. As it appears on page 8, of Exhibit 47, the balance transferred from interest account was $1,857.25?

A. Yes sir.

Q. And if to that you add the Crown Hill Cemetery item of $19.50, you will get the amount reported by the secretary $1,876.75?

A. Yes sir.

Q. The secretary reports rents received, $1,200. That agrees with your surplus account, does it not?

A. Yes sir.

Q. The secretary reports cars sold, $9,025. That is made up, is it not, of three items appearing on page 9 of Exhibit 48, profit and loss account, and reading as follows: "For cars delivered to the St. Louis, Vandalia & Terre Haute railroad"—I give the aggregate and not the items—"$8,450." Above that at the top of the same page, "By amount received for an old box car sold, $25."

A. Yes.

Q. And below that "By amount received from the P. C. & St. L. R. R. for damages to car $550"?

A. Yes.

Q. That makes up the amount, does it not?

A. $9,025, yes sir.

Q. The secretary also reports $2,000 as received from the Adams Express Company. That item appears on page 9 of this profit and loss account, does it not?

A. Yes sir.

Q. The secretary reports material sold $11,321.84 Do you
1783 know, without looking it up, how he gets that amount?

A. No sir, I do not.

Q. I will ask you to follow me as I give you the items which go to make it up. In that year, 1869, profit and loss is credited, as shown on page 9 of Exhibit 48 with the following items: Wood on hand December 1st, $18,077.80. Do you find that?

A. Yes.

Q. Cross ties on hand December 1st, 1868, $10,376

A. Yes.

Q. Railroad iron, chairs and spikes, and so forth on hand, same date, $64,824.71. Do you find that?

A. Yes sir.

Q. Machine shop material on hand December 1st, 1868, $52,-207.04?

A. Yes.

Q. Now, have you those items down so that you can give me the aggregate of them?

A. Yes sir, $145,485.35

Q. Now, on page 10 of this same Exhibit 48, do you not find the following items to the debit side of profit and loss account: Wood on hand December 1st, $32,595.

A. Yes sir.

Q. Cross ties on hand same date, $7,220?

A. Yes.

Q. Railroad iron, chair, and so forth, on hand same date $25,658.31?

A. Yes.

Q. Machine shop material on hand, same date, $68,690.40?
A. Yes.
Q. Now, the aggregate of those items, please.
A. $134,163.71
1784 Q. Now, take that from the other aggregate of $145,485.55 and give me the remainder.
A. $11,321.84
Q. And is not that the same that the secretary reports as material sold?
A. Yes sir.
Q. The secretary then has reported as an earning the credit balance of these four accounts, has he not?
A. Yes sir.
Q. And you did not take them into consideration at all in making up your statement, did you?
A. No.
Q. Now, the secretary reports profit and loss $235, as an earning for that year. Please look at page 9 of Exhibit 48, being the profit and loss account, and see if you do not find that item there credited to profit and loss on account of a draft drawn by the treasurer on Rev. John Rose?
A. Yes sir.
Q. At St. Charles, Missouri?
A. Yes sir, it is there.
Q. You have here in parenthases, opposite this charge a memorandum of record 2, page 126. Has that any bearing upon it at all that you remember?
A. I think that recites a correspondence with this reverend gentleman, in which he said he had received some money from a conscience-stricken man and asked that they would donate something to his church that he was building, or something of that kind, and they divided with him.
Q. Well, we got some money, did we?
A. Oh, yes sir, he remitted half of it, and kept half.
1785 Q. These items, as we have checked them over, comparing the secretary's account with yours, seem to agree in everything, except this item of materials sold for $11,321.84?
A. Yes sir.
Q. But that item is more than the excess that you found just now. We ought to balance, but I understand we do not. The difference is $461.60 If you do not find that item readily, it is now our adjourning time and perhaps you can get it for us by two o'clock.

Whereupon, the further hearing was continued until two o'clock p. m.

1786 FRIDAY, *October* 27, 1899—Two o'clock p. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, with the exception of Judge Robert S. Taylor, of counsel for plaintiff, and Lawrence Maxwell, Esq., of counsel for defendant.

The cross-examination of the witness, GEORGE C. DUY, was resumed, as follows:

Questions by Mr. JOHN G. WILLIAMS:

Q. Just as we adjourned we were trying to discover the explanation of the discrepancy of $461.60 between the amount of earnings from other sources for the year 1869, as stated by you, and similar earnings as stated by the secretary in his printed report for that year. If you have ascertained the explanation of that difference, will you please state it?

A. If you take the amount that I have charged from interest account, $4,745.10, and deduct from it $2,287.85, erroneously charged that will leave a balance of interest account of $1,857.25, which added to the other items will give you seventy-five thousand—added to the items taken from profit and loss and surplus will give you $75,025.36; add $11,260. and $61,908.11 and it will give you $75,025.36. If you add to that interest on C. & I. bonds sold $1,826.25 and 11,321.84 for material sold, both of which items are omitted in my statement, it will give you $88,173.45, which is the amount on the secretary's report.

1787 Mr. KETCHAM: Wait a moment. I understand Mr. Williams is trying to find $461.60; you turn him over eighty-eight thousand dollars. How does that explain the matter?

Mr. WILLIAMS: He makes it balance, and in that way does away with the $461.60

The WITNESS: The difference spoken of of $461.60 is arrived at by adding—is the difference between $2,287.85 added and $1,826.25 deducted from my statement.

Q. To state in in another way, you had interest charged at $4,145.10; the secretary's printed report gives as interest $1,857.25 and $1,826.25 realized from the C. & I. bond transaction, The aggregate of those two items of interest as reported by the secretary makes $3,683.50, which deducted from the interest as you give it, $4,145.10, makes the difference we were talking about of $461.60

A. Yes sir; if your figures are right.

Q. Now, for the year 1870, on page 12 of Exhibit 45, you have us charged with interest $1,166.63

A. Yes.

Q. The credit balance of interest account that year transferred to surplus as shown on page 9 of Exhibit 47 was $334.22, was it not?

A. Yes sir.

Q. You have us charged that year on account of profit and loss $2,906. The balance that year on profit and loss was a debit bal-

ance, was it not, and transferred to the debit of surplus at the bottom of page 9 on Exhibit 47. You find there the debit from profit & loss?

1788 A. Surplus account is debited and profit and loss credited $3,232.50

Q. Now, you charge us that year on account of surplus $8,194.04. Will you tell me where you get that?—I see that amount is the footing of all the items with which surplus is credited that year except new locomotives, new freight cars and South Branch construction?

A. Yes.

Q. Transportation balance and interest and exchange balance?

A. I do not see anything about new locomotives. Oh, yes, that is all right.

Q. Now, that item of interest should be $334.22 instead of $1,166.63, should it not?

A. On your theory.

Q. Yes sir.

A. Yes sir.

Q. And the item of $2,906. which you charge us with on account of profit and loss is made up of the first four items on page 10 of Exhibit 48. is it not?

A. Yes sir.

Q. What were those items, please?

A. Old scraps sold $150; passenger coach No. 5 sold, $2,500; house—I think it is—sold for $250; for dividend remaining unpaid on the books $6

Q. In fact, a dividend had been paid.

A. He said so, yes.

Q. Please turn to the secretary's report for the year, and on page 9, what do you find he reports as dividends received on stocks?

A. $42,132.

1789 Q. That represents, does it not, the dividends on T. H. & I. stock and on the Union Star Line stock, appearing in the surplus account on page 9, of Exhibit 47, right at the top of the page, Mr. Duy.

A. $42,132., yes sir.

Q. The secretary reports how much for interest on bonds?

A. 38,209.68

Q. That tallies with the footing of interest on bonds, does it not, as it appears at the bottom of page 8, of Exhibit 47?

A. Yes sir.

Q. What does the secretary report as rents received?

A. $752.36

Q. That appears in the surplus account for that year, does it not, on page 9 of Exhibit 47?

A. Yes sir.

Q. What does the secretary report for passenger car sold?

A. $2,500.

Q. That appears in the profit and loss account, does it not, on page 10 of Exhibit 48?

A. Yes sir.

Q. And what does he report as received from profit and loss account?

A. $406.

Q. And that is made up of the other three items which you had charged, is it not?

A. Yes sir.

Q. $150 for old scrap, $250 for house sold and $6 for a dividend that had been actually paid but not charged off.

A. Yes.

Q. Now, what is the aggregate of the earnings reported
1790 by the secretary for that year, Mr. Duy, outside of transportation?

A. $83,994.04

Q. You have left out the six dollars, didn't you, Mr. Duy?

A. Yes; I have so much difficulty is seeing here. It should be $84,000.04

Q. Now, instead of charging us with $1,166.63 with interest for that year, you have only charged us with the balance of interest carried to surplus, namely, $334.22, what would have been the footing of your charges against us?

A. $84,334.26

Q. I will call your attention to the fact that while there is a credit balance carried to the credit of surplus from interest and exchange of $334.22 surplus account that year is also debited from interest and exchange with $90,559.07. You will find that on page 9 of Exhibit 47—do you not? It is right below the item of municipal taxes and interest.

A. On Exhibit 47?

Q. Yes sir, surplus, itemized surplus, page 9 of the Exhibit. You don't know how it corresponds with yours. Do you find the debtor side of surplus there for 1870?

A. Yes sir, I find what you are talking about.

Q. That is what I am waiting to hear.

A. Surplus is charged and interest and exchange is credited with $90,559.07

Q. That, of course, more than cancels the credit item of $334.22, does it not?

A. It cancels two items on page 27 of Exhibit 46, $334.22
1791 and $90,224.85, and in that view, according to your theory, there should be no interest credited at all.

Q. And the secretary did not credit any?

A. No sir.

Q. On page 13, of Exhibit 45, you have us charged for the year 1871 with interest account $5,420.23

A. Yes.

Q. The balance that year from interest and exchange was a debit balance, was it not, of $69,873.08, and carried to surplus?

A. Yes sir.

Q. You also have us charged for that year as coming from profit and loss with $491.75 Will you please give me the items that go to make up that charge. They evidently appear on pages 11 and 12 of Exhibit 48. Your pencil checks would indicate that the first item is a credit to profit and loss by the treasurer "For conscience money refunded, $28."

A. Yes, right.

Q. And "Treasurer from Lake Shore & Michigan Southern railroad for car burned, $350."

A. That's right.

Q. And for "Atlantic and Pacific Telegraph Company, right of way to build line along the T. H. & I. road, $63.75."

A. Right.

Q. And "Bills payable for orders issued to employés supposed to be lost, $10."

A. Right.

Q. Do those items foot up $491.75?

A. No sir; there is one other item below there; "real estate for depot grounds, balance transferred, $40."

1792 Q. Yes; I see you have checked it. Now, there was a credit balance on profit and loss that year, was there not?

A. Yes sir.

Q. A credit of $39,898.33

A. Yes sir.

Q. Which was transferred, or carried to the credit of surplus account, was it not?

A. Yes sir.

Q. You have charged us that same year, 1871, as earnings from surplus $76,525.15

A. Yes sir.

Q. Will you please give me the items that go to make up that amount?

A. They appear at the top of page 10 of Exhibit 47 and embrace everything on the credit side of surplus that year except the balance brought forward from profit and loss and the balance from transportation account. Interest, St. L. V. & T. H. second mortgage bonds $5,880; interest, Evansville city bonds, $3,500; interest, St. L. V. & T. H. second mortgage, convertible $14,000; interest E. & C. extension bonds $7,385; interest, St. L. V. & T. H. first mortgage bonds, $140; interest, Union Star Line stock, $300; interest, T. H. & I. R. R. stock, $41,832; rents, $3,488.15.

Q. Making a total of what? Did you take them down?

A. No sir, I was reading them off. I will tell you in a minute. $76,525.15

Q. And that is the amount you have us charged with, page 13 of Exhibit 45, as coming from surplus?

A. Yes sir.

1793 Q. Now, please look at the secretary's printed report for that year and tell me what you find he reports as having received from dividends on stocks.

A. $42,132.

Q. And that is made up, is it not, of the $300 on Union Star Line stock and $41,832 on T. H. & I. stock, which you just read?

A. Yes sir.

Q. And what does he report as received as interest on bonds?

A. $38,209.68

Q. Are you on 1871?

A. I beg pardon; I slipped over to the wrong side.

Q. You have got the wrong year.

A. $30,905.

Q. Yes sir. Now, can you give me the items of which that is made up on your surplus exhibit?

A. Yes sir.

Q. Please do so.

A. Interest on St. Louis, Vandalia and Terre Haute mortgage bonds $5,880; Evansville City bonds $3,500; St. Louis, Vandalia and Terre Haute second mortgage convertible, $14,000; E. & C. extension bonds, $7,385; St. Louis, Vandalia and Terre Haute first mortgage, $140.

Q. Those items you have just read foot up $30,905, do they?

A. Yes sir.

Q. What does the secretary report as the real estate sold?

A. $1,005.61.

Q. That amount is represented by the three last items appearing at the end of the credit side of profit and loss account for that year, on page 12 of Exhibit 48, is it not?

1794 A. Yes.

Q. Not quite is it?

A. Unless we got that forty dollars in before.

Q. You had it in before.

A. Yes sir.

Q. But the way he has got it stated?

A. Yes, it is in that $1,008.61

Q. Those three items that I referred to are real estate for depot grounds, $40., Greenlawn cemetery $88.; and real estate account $880.61.

A. That is right.

Q. Now, how much do you find the secretary reports that year on account of material sold?

A. $36,786.30

Q. Can you give me readily, have you figured it out where that amount for material sold comes from? If you will permit me, I will——

A. It comes from that amount, $36,786.30 and the $1,008.61, the profit and loss balance, and $2,103.42 from the secretary's statement, balances the item of $39,898.33 on our statement.

Q. Now, in order to show where that item of material sold——

A. Wait a moment. And that would leave $36,786.30 from materials sold, taking off the other two items that I gave.

Q. Now, I think that item of materials sold represents a credit

balance on those several supply accounts that were transferred and carried in profit and loss, and if you will take the profit and loss account for that year we will ascertain if that is correct. You take down the amounts as I give them to you for the several accounts.

1795 A. Yes.

Q. On page 12, Exhibit 48, you will find profit and loss credited as follows: Sundries for the following supplies on hand, December 1st, 1870 and charged to profit and loss: railroad iron, chairs and spikes $21,832.13; wood purchased $38,667.20, cross ties $7,221.56, machine shop material $72,581.32. Please give me the footing of those items.

A. $140,302.21

Q. Now, on the debit side of profit and loss account that year, appearing on page 13, of Exhibit 48, you will find the following items.

A. Page 13?

Q. Page 13, yes sir. Wait a minute. No, I was wrong. It is the other year I was going to give you. You will find that on page 12 for 1871.

A. Yes.

Q. Railroad iron, chairs and spikes account, 1872, transferred, $18,584.85

A. Yes sir.

Q. Wood purchased account, 1872, transferred, $9,000.

A. Yes sir.

Q. Cross ties account, 1872, transferred, $1,200.

A. Yes sir.

Q. Machine shop material account, 1872, transferred, $73,735.41.

A. Yes.

Q. There is still another debit to go in there, repairs of bridges, 1872, transferred, $995.65

A. Yes sir.

Q. Now, what will the amount of those five items be?

A. $103,515.91

1796 Q. Now, will you please deduct that from $140,302.21, being the footing of the items you just gave me on the credit side of profit and loss.

A. $36,786.30

Q. And is not that the amount that the secretary reports as material sold?

A. Yes sir, I think so (after referring) yes it is.

Q. What do you find the secretary reports for rents received 1871?

A. $3,488.15

Q. That corresponds with rents credited to surplus for that year on page 10 of Exhibit 47, does it not?

A. Yes sir.

Q. And what does he report for profit and loss, the secretary.

A. $2,103.42

Q. I will ask you if that amount is not made up from the follow-

ing items, from the profit and loss account, beginning on page 11, of Exhibit 48: Treasurer, conscience money refunded, $28—will you take them down as we go along so that you can tell me what they amount to when we get through?

A. Yes sir.

Q. From the Lake Shore road for car burned, $350?

A. Yes sir.

Q. From telegraph company for right of way to build line along the T. H. & I. road—no, excuse me; please erase that item of $350, for amount received from treasurer for Lake Shore car burned, and take in its stead the credit to profit and loss that year on account of internal revenue taxes on the January dividend and the June or July dividend of $3,058.69

1797 A. Yes.

Q. Then the item of $63.75 received from the telegraph company.

A. Yes sir.

Q. Then on page 12, the item of ten dollars for orders issued to employés supposed to be lost.

A. Yes sir.

Q. And the item on the same page of $802.29 being a credit on account of internal revenue tax on the July dividend.

A. Yes sir.

Q. What does the aggregate of those items amount to?

A. $3,962.73

Q. Now please deduct from that the debit item on that same page 12 of $1,859.31 on account of the internal revenue tax on the July and January dividends and the August and December dividends.

A. Yes sir.

Q. And what does that give you?

A. $2,103.42

Q. And is that what the secretary reports?

A. Yes sir.

Q. As coming from profit and loss?

A. Correct.

Q. Now, that item which you have included in your statement of $350. received by the treasurer from the Lake Shore road for a car burned is offset by the first debit item on profit and loss of that year, is it not? by $350. for foreign work and material?

A. It is transferred to that account, yes sir.

Q. What is the total amount reported by the secretary that year as earnings from sources other than transportation, 1871?

1798 A. $116.423.48

Q. And what is the amount that you charge us with that year?

A. Leaving out the interest?

Q. No sir; just as you had it charged.

A. $82,437.13

Q. And what is the excess of the amount reported by the secretary over the amount reported by you?

A. $33,986.35

Q. And that represents, does it not, the difference between the material sold, of which you took no account, and the excess of interest which you charged from the secretary's point of view.

A. No, I think not.

Q. Well, it will pretty near represent it. Get it down, though.

A. Materials sold is $36,786.30. If you take our statement, $82,437.13 and deduct from it the amount charged on our statement from interest, $5,420.23, the balance will be $77,016.90. If you add to that $2,621.28, which is the difference between our charge from profit and loss of $491.77 and what it should be, $3,112.03 the product will be $79,637.18; and add to that the materials sold, $36,786.30, and it will give you $116,423.48, which is the aggregate of the earnings reported on the secretary's statement outside of transportation.

Q. All right, sir. I am much obliged to you. You have not come across any other items have you, in going over this year, which you think should be included?

A. No sir; I do not see anything else.

Q. For the year 1872, on page 13, of Exhibit 45, you have
1799 us charged with interest $5,934.47

A. Yes sir.

Q. There was a change in the method of keeping books that year, was there not?

A. Yes sir.

Q. And instead of carrying the balance of interest and exchange account to surplus, as had been formerly the custom, it was carried that year to profit and loss, was it not? Look at page 13, of Exhibit 48, and see if you do not find profit and loss credited there with balance from interest and exchange $5,934.47

A. That is right.

Q. And that is identical with the charge as you made it against us.

A. Yes sir.

Q. Now, you have also charged against us for that year on account of profit and loss, $69,748.04

A. Yes sir.

Q. I will ask you if that is not made up of the interest on bonds, dividends and stocks, amount of profit on sale of Union Line stock and amount realized on a revision of the charges made for superintendent and clerks of the motive power department in settling with the Vandalia, and as those items appear on page 13, of the profit and loss Exhibit No. 48? Can you find them readily? I will call them to you if it will expedite matters any. I have them here with your pencil checks against them.

A. I think I have them. $67,152?

Q. Yes sir.

A. $346.04?

Q. Yes sir.

1800 A. $2,250?

Q. Yes sir. What does that make?

A. $69,748.04

Q. And that is what you have charged us with?

A. Yes sir.

Q. And having charged us with that amount and with the interest $5,934.47, you have charged us with everything in the profit and loss account for that year except those supply accounts—I mean of course on the credit side of profit and loss—except those supply accounts, the transportation balance and the surplus account balance?

A. Yes sir.

Q. Turn to the secretary's report, as it appears in the printed annual report for that year, and tell me what he reports as earnings other than transportation?

A. The items?

Q. Yes sir.

A. Interest on bonds $25,095; interest on stocks $42,057; interest and exchange $5,934.47; materials sold $6,671.71

Q. Now, what was the aggregate of those four items?

A. $79,758.18

Q. That is more than what you have us charged with, is it not, Mr. Duy?

A. Yes sir,

Q. How much more?

A. $4,075.67

Q. You did not have us charged with anything on account of materials sold, did you?

A. No sir.

Q. For which the secretary reports $6,671.71 Can you
1801 tell me where that item came from?

A. That item of material?

Q. Yes sir.

A. It came from the profit and loss account entries, I suppose.

Q. Well, will you please look at the profit and loss account and put down the following items as they appear on the credit side of that account for 1872: Sundries, for supplies on hand, December 1st, 1871, transferred, railroad and bridge materials, railroad iron, chairs and spikes, $18,584.85

A. Where do you get that?

Q. On page 13 of Exhibit 48. Do you find it?

A. Yes sir.

Q. $18,584.85. Cross ties $1,200.

A. Yes sir.

Q. Bridge material $995.65?

A. Yes sir.

Q. Wood purchased $9,000?

A. Yes sir.

Q. Machine shops $73,735.41

A. Yes sir.

Q. Now, what do you make them, please?

A. $103,515.91

Q. Yes sir. Now turn to page 14 of the same Exhibit 48, and on the debit side of the profit and loss account, and take down the following items: Wood purchased $5,583.92?

A. Yes sir.

Q. Machine shop $82,426.31

A. Yes.

Q. Railroad and bridge material $8,833.97

1802 A. Yes sir.

Q. What is the aggregate of those?

A. $96,844.20

Q. Taking that from $103,515.91 which you had just now to the credit of profit and loss on account of those accounts what is the balance?

A. $6,671.71

Q. The amount reported by the secretary as material sold, is it not?

A. Yes sir.

Q. If you were to add to the account as rendered by you the amount of that item of material sold, you would still be out of balance with the secretary's report, would you not?

A. Yes sir.

Q. You would be out of balance $2,596.04, would you not?

A. I have forgotten what I told you the secretary had.

Q. The secretary had $73,758.18

A. $2,596.04, yes sir.

Q. Now, I will ask you if that discrepancy is not accounted for on page 13 of Exhibit 48, by the following items: Profit on sale of fifty shares of Union Star Line stock, $2,250?

A. Page 13. Yes sir.

Q. Exhibit 48, right at the top of the page.

A. Yes sir.

Q. Do you find it?

A. Yes sir.

Q. And the other item of $346.04 credited for account transferred to Van books, the same being caused by a revision of the amount paid superintendents and clerks of the motive power department for six months, ending December 31, 1871.

1803 A. Those two items account for the amount of the discrepancy?

Q. $2,596.04?

A. Yes sir.

Q. Now, have you noticed any other items on the papers that we have gone over that should be charged as earnings for that year?

A. No sir.

Q. Now, Exhibit No. 51, total net earnings to January 15, 1873. Mr. Duy, upon this Exhibit No. 51, you state transportation earnings year by year?

A. Yes sir.

Q. I will ask you if the amounts that you gave there as transportation earnings for each year don't represent simply the difference

between transportation receipts and operating expenses as they are classified by the secretary?

A. Yes sir, except in one or two instances where they differ.

Q. Well, in none of these years. So far as this statement is concerned there are none of these transportation earnings of which any account has been taken of what the secretary termed additional expenditures, is there?

A. No, I think not.

Q. Now, do you remember any year where you made up this statement upon something other than the mere transportation receipts and the operating expenses?

A. I am thinking now there was one year in which the secretary charged the operating expenses some $65.000. of depreciation, or depreciated value on stocks.

Q. Yes sir; that was in the year 1867.

1804 A. And there may be some others where there is a difference.

Q. Now, take the year 1867, to which you just referred. The secretary reported no classification that year at all, but he gave as operating expenses $644,330.13. Do you find the book?

A. I have it now.

Q. Now, if you deducted that from the transportation receipts-for the year as shown by the secretary, $1,075,513.55, what would you have left as transportation earnings?

A. $331,183.42

Q. Now, you return on this statement as transportation earnings for 1867 $498,118.42

A. Yes sir.

Q. What is the difference?

A. That is $431,183.42, I should say.

Q. What is the difference between that and the amount you just gave?

A. $66,935.

Q. Now, that difference, we found in going over the transportation receipts, was made up of two items, didn't we; one of $65,935, being debited to profit and loss account on account of revaluation of the shares of the company's stock held by the company?

A. Yes sir.

Q. And one thousand dollars of a donation to the Vigo County Agricultural Society?

A. Yes sir.

Q. Which we agree, I think all of us, that those items were not proper operating expenses. But outside of that one year is

1805 there any other year there now in which you have taken, in making up this statement, simply the difference between transportation receipts and the transportation expenses?

A. I do not recall any,

Q. And the item appearing upon this Exhibit No. 51 as other earnings are the same items that appear on your itemized statement of other earnings given in Exhibit 45?

A. Yes sir.

Q. They are simply transferred from that exhibit to this summary?

A. Yes sir. There are several items there subject to correction.

Q. You mean the items we have been going over on Exhibit 45.

A. Yes sir.

Q. Now, Mr. Duy, and counsel on the other side. I wish to take up Exhibit No. 21, entitled, "Statement of items showing concealment of assets and reduction of surplus." The first items noticed in this Exhibit No. 21, are included under the ledger heading of machine shop account, are they not?

A. Yes sir.

Q. And you seem to give a combined history of that account, and your suggestions concerning the same.

A. Yes sir.

Q. You first called attention to a debit balance of machine shop account shown on Ledger B, page 78, of $17,355.29

A. Yes.

Q. And an inventory taken at that date which showed material on hand to the amount of $34,423.04

1806 A. Yes sir.

Q. And the difference between the real material on hand and the book balance, $17,067.75 is credited as you state to profit and loss that year?

A. Yes sir.

Q That was in 1856. Now, from that year that machine shop is carried on from year to year, showing a balance at the close of each year, and reported in the printed statements, you say as assets until November, 1867. Now, in what printed statements do they appear? Take any year, 1865, or 1866, or any one you please, on up near 1867—take 1864, to accommodate me, now.

A. What account have we? Machine shop account?

Q. Yes sir.

A. On page 12?

Q. Of the secretary's report for the year ending November 30, 1864.

A. Statement No. 3, balance of ledger, materials $53,283.73

Q. That is shown as a ledger balance.

A. Yes sir.

Q. At the close of that year of that account?

A. Yes sir.

Q. But, it appears as a part of the assets by reason of the manner in which it is placed in the account, does it not?

A. Yes sir, that represents assets and liabilities, the ledger balances.

Q. Now, take it in 1865. What did that account appear, and under what head, in the secretary's report?

A. I think I made a mistake; I think I told you 1863 instead of 1864.

1807 Q. That is all right; then give me 1864; you gave me 1863.

A. In 1864, machine shop material, $68,060.13. That is in statement No. 2, on page 12, of that report.

Q. How did that compare with the account of the year before?

A. I don't know what that was. A few thousand dollars more, I think. It was nearly $15,000 more.

Q. Nearly $15,000 larger?

A. Yes sir.

Q. Now during those same years you also find in that same ledger balance, do you not, opposite machine shop material, a cross tie account?

A. Yes sir.

Q. And fuel?

A. Yes sir.

Q. And the amounts appearing in those ledger balances are the balances of those accounts as they appeared on the ledger at that date, are they not?

A. I think so; yes sir.

Q. All those accounts had debit and credit entries, didn't they?

A. Yes sir.

Q. And these amounts that are printed in this ledger balance indicate that it is a balance—the difference between the two sides, debit and credit, don't they?

A. Yes sir, this is what I call a trial balance sheet.

Q. These ledger balances?

A. Yes sir, the debit and credit balances on the ledger as it stands at that date, or at any given date.

Q. Now, take it for the year 1866; what ledger balances do you find there for that year for machine shop account?

1808 A. $60,579.91

Q. That year showed a decrease in that balance, in round numbers of nine thousand dollars, didn't it?

A. About eight thousand dollars.

Q. Eighty-seven hundred dollars.

A. Is it?

Mr. KETCHAM: No; it is less than seventy-five hundred.

Mr. WILLIAMS: Let us take $60,579.91 from $69,296.18 and see if it is not about eighty-seven hundred dollars.

Mr. KETCHAM: But he didn't give you $69,298.18; he didn't give that; he gave $68,060.13

The WITNESS: In 1865? In 1865, $69,298.18

Q. Well, it was somewhere in the neighborhood of eighty-seven hundred dollars, then?

A. Yes sir.

Q. Among those ledger balances in 1865 there was not any cross-tie account at all, was there?

A. No sir.

Q. There was wood on hand?

A. Yes sir.

Q. Now, in 1866 there was wood on hand and cross-tie too, was there not?
A. Yes sir.
Q In 1865 the absence of any cross tie balance represented that there was not any balance on the ledger at that time to that account?
A. Yes sir.
Q. Now, go to 1867, please, Mr. Duy.
1809 A. Yes sir.
Q. Do you find any material in shops account there?
A. No sir.
Q. Or cross ties?
A. No sir.
Q. Those accounts were taken to profit and loss, were they not, that year?
A. Yes sir, I believe so.
Q. To the debit of profit and loss?
A. November 30, 1867.
Q. And what was the amount of machine shop account placed to the debit of profit and loss account that year?
A. $61,604.31
Q. Now, do you know if that was the ledger balance of that account at that time?
A. That charge to profit and loss closed the account.
Q. And that was the ledger balance at that date?
A. The correct balance.
Q. Now, please look and see if the ledger balances on that date of wood purchased account was $23,160
A. I have my original pencil memorandum here; it is not very easy to find.
Q. My question was directing you to look and see if the real ledger balance on wood account was $23,160. or what it was.
A. There is no balance appears on the trial balance sheet, because it is charged off.
Q. But you have it.
A. No sir.
Q. You have it for the machine shop account.
A. I had that from this manuscript, such as you are reading from there.
1810 Q. Cannot you tell me that?
A. I can when I find it. I say I have the original pencil manuscript here that I made. Yes sir, wood purchased account in 1867, $23,160.
Q. That was the ledger balance at the close of 1867?
A. Yes sir.
Q. And that was taken to the debit of profit and loss?
A. Yes sir.
Q. At the same time with that transfer of the machine shop account?
A. Yes sir.
Q. Now in November 1868 was not profit and loss credited with

machine shop material $61,604.31, and with wood purchased account $23,160., the identical items with which that account had been debited the previous year?

A. Charged back to machine shop November 30, 1868.

Q. But I am asking you about profit and loss.

A. Yes sir. Credited to profit and loss and charged back to machine shop.

Q. Credited to profit and loss and charged back to machine shop.

A. Yes sir.

Q. And the wood account was treated the same way.

A. The same way, yes sir.

Q. Now, in 1868, the same year in which these accounts were credited to profit and loss, there were debits to the same account of profit and loss for machine shop material and wood, was there not?

A. Yes sir.

Q. And of what did those debits consist? Were they the balances of those accounts at the close of 1868?

A. I thought you said during the same year. What year
1811 do you mean? If you mean in the year 1868, during the year 1868 there were debits to the machine shop account and wood purchased account of various items of material bought; but at the end of the year there was another debit for the balance of the amount, a debit to profit and loss.

Q. No.

A. Then I don't understand exactly what you want to get at.

Q. We do not understand each other. At the close of the year 1867 profit and loss was debited with material on hands $61,604.31

A. Yes sir.

Q. And with wood purchased account, $23,160.

A. Yes sir.

Q. Under date of November 30, 1868, profit and loss was credited with $23,160., and under date of November 30, 1868, was further credited with machine shop material $61,604.31, was it not?

A. Yes sir.

Q. Now, that same year, 1868, profit and loss was debited was it not, with machine shop material on hand December 1st, of that year, and with wood on hand December 1st of that year?

A. Yes sir.

Q. Now, what were the items of those debits?

A. November 30, 1868, profit and loss account is charged and machine shop credited $52,207.04

Q. Yes sir, and wood account?

A. And wood account is credited and profit and loss charged with $18,077.80

1812 Q. Now, were those two amounts you have last given, respectively, the balances on machine shop account and wood account at the close of 1868?

A. Yes sir; after the balances of 1867 had been charged back again.

Q. Sir?

A. After the balances of 1867 had been charged back again to the respective accounts.

Q. To the credit of profit and loss?

A. Passed to the credit of profit and loss and charged back to these accounts.

Q. Mr. Duy, if you took the difference between the credits of profit and loss of machine shop material in this year of 1868 of $61,604.31, and the debit to profit and loss the same year of $52,207.04, would not that difference between those items represent the change in the account between the end of 1867 and the end of 1868?

A. It would represent the difference in the balance, yes sir.

Q. And as an illustration, take those two entries: profit and loss that year, 1868, had credited to it more than it was debited with that year for machine shop material, didn't it?

A. Yes sir.

Q. How much more?

A. $9,397.27

Q. Wood account had a credit that year of $23,160, didn't it?

A. Yes sir.

Q. And a debit of $18,077.80

A. Yes.

Q. So that there was a credit on profit and loss account
1813 that year on the wood account also, was there not?

A. Yes sir.

Q. How much?

A. $5,082.20

Q. Now, do you think that the effect of those entries on the credit and debit side of machine shop account and wood account for that year tended to diminish the surplus?

A. No sir, not absolutely. Not actually; it diminished the balance of surplus.

Q. Didn't it increase it so far as those accounts were concerned?

A. Not at the time this statement was made.

Q. Didn't it though? Was not this balance, whatever it was, of profit and loss account carried to surplus that year?

A. Yes sir; and in the mean time a statement was made, between the postings of the two entries.

Q. Well, but that don't change the year 1868, does it?

A. I never said it did. I said it didn't actually decrease the surplus account, but I do say as I have said heretofore, that the charging of these various items to surplus account at the end of the year and closing the account, and then upon that basis publishing this statement, reduced the apparent amount of assets on hand, and reduced the apparent balance of surplus just exactly that amount.

Q. That was the statement for 1867.

A. I cannot place where these are charged.

Q. In any year?

A. I cannot place where they are charged and charged back again.

1814 Q. Then that is what we want to get at. See whether you are right about that?

A. Well, I may be wrong about that.

Q. Now, in 1867 this machine shop account and this wood account was debited to surplus.

A. Yes sir.

Q. Was it not?

A. Yes sir.

Q. And the statement for that year, for the year ending November 30, 1867, showed a surplus account less than it would have been had those two accounts been left to the credit of the ledger balance as it had been previously.

A. Yes sir.

Q. That is undoubtedly true, is it not?

A. Yes sir.

Q. And those two accounts amounted at that time to what?

A. Oh, eighty odd thousand dollars.

Q. Well, give it to us.

A. $84,764.31

Q. Now, to that extent surplus for the year ending November 30, 1867, was less than it would have been had these accounts been carried as assets in the ledger balance as they had been before?

A. Yes sir.

Q. But now in 1868 those same items exactly, amounting to eighty-four thousand dollars, were carried to profit and loss.

A. Yes.

Q. And that balance from profit and loss went into surplus?

A. Yes sir.

1815 Q. At the close of that year; and had there not been any other entries made on the profit and loss account that year but profit and loss account had simply been credited with that eighty-four thousand and odd dollars, would not that have restored to the surplus the amount by which it was diminished in 1867?

A. If they were credited back to the surplus account, or to the profit and loss account, they would leave it just where it was.

Q. Where it ought to have been?

A. No, where it was. It amounts to the same thing exactly as if they had carried the balance over.

Q. Then surplus would not have been any further diminished in 1868, would it?

A. No, not by simply crediting that back.

Q. But it would have stood just as if the account had not been charged off in 1867, would it not?

A. Yes, if it was done in time to show.

Q. That is what I mean.

Mr. KETCHAM: And nothing else done.

Q. And nothing else done; that making the full charge to profit and loss that year.

A. Yes sir.

Q. Now, there was something else done in 1868?

A. Yes sir.

Q. There were debits to profit and loss of machine shop material and wood accounts, and those debits were the balances of those accounts respectively as they appeared on the book at the close of November 30, 1868.

A. Yes sir.

1816 Q. Those balances were less.

A. Yes sir.

Q. (continued.) than the credits which had been transferred as representing the balance at the close of 1867?

A. Yes sir.

Q. And to that extent, to the extent of the excess of those two accounts, over and above the debits made on those two accounts, to the extent of that excess surplus was increased that year by the transfer of the profit and loss balance to surplus, was it not?

A. Yes sir, sertainly.

Q. So that surplus was not diminished that year, in 1868, by crediting it with those accounts, even though you took into consideration the debits made on surplus of those two accounts.

A. When those accounts were credited back surplus was not diminished.

Q. Sir?

A. Surplus was not diminished; surplus was increased.

Q. Yes sir.

A. But at the same time the assets were not disclosed?

Q. Not disclosed?

A. No sir, not in these statements.

Q. Didn't they appear in the general account in the amount carried to surplus?

A. As assets on hand?

Q. No, no, no detail of assets on hand; they didn't appear on that; but didn't they appear in the amount that went to surplus that year, as shown by his statement in his general account—not his ledger balances, but his general account?

A. Well, that I cannot say.

1817 Q. Well, didn't they necessarily?

A. He showed the balance of the year's surplus account, yes sir.

Q. Now, was not surplus increased in 1868?

A. Surplus that year was increased.

Q. I mean generally.

A. Well, I don't know.

Q. Well, look and see, will you not, please, on his book, or on yours, either one.

A. Oh, surplus account was increased, yes sir; I don't know whether it was by these particular accounts or not.

Q. I do not mean by these particular accounts, but there was a general increase of surplus account in 1868?

A. Oh, yes sir; and all the way along.

Q. Well, there was a diminution in 1867.
A. Yes sir.
Q. The surplus balance of 1867 was less than it was at close of 1866, was it not?
A. I don't know.
Q. Don't you remember?
A. No sir, I don't remember.
Q. Well, it was. It was caused by the revaluation of assets mostly, which you have already given an account of.
A. Yes sir.
Q. Now, let us go a year further, in 1869——

Mr. KETCHAM: Before you leave 1868 let us see if I can understand it. I do not want to interject a question into your cross-examination, but——
Mr. WILLIAMS: That is all right.

1818 By Mr. KETCHAM:

Q. As I understand you, Mr. Duy, with reference to those entries made in 1868 of $52,207.04 in the machine shop account, and $18,077.80 in the wood purchased account, making an aggregate of $70,284.84, it would not, the entries having been made as you have given them, leave the surplus, while it was larger because the amounts that had come over were larger, apparently smaller by $70,284.84 than really was there according to the books.
A. It would not; if those entries had not been made the books would have shown that much on hand in material.
Q. How much more on hand in material?
A. I don't think—it don't strike me now that the surplus account shows that property on hand in any shape.

By Mr. WILLIAMS:

Q. Those two items on the debit side, standing alone, would have diminished surplus just as the charge in 1867 diminished surplus, but taken in connection with the credit to profit and loss of the very same items that year that were debited in 1867 it didn't make any diminution of surplus, did it?
A. No sir.
Q. It could not possibly.
A. Not in figures; not in the surplus account.
Q. Now, in 1869; was not profit and loss account credited in 1869 with exactly the items with which it was debited in 1868?
A. Yes sir.
Q. So that profit and loss got a credit in 1869 for the exact amount that it was debited for those two items in 1868?
1819 A. Precisely.
Q. And also in 1869?
A. In connection with that machine shop was debited with that amount.

Q. You mean the machine shop account?

A. Yes sir.

Q. Oh, certainly, there had to be two entries made with the double entry system. If profit and loss account was credited machine shop account was debited necessarily.

A. Yes sir.

Q. But that same year, 1869, profit and loss account was debited with the balance of machine shop account and wood account as they stood at the close of 1869, was it not?

A. Yes sir.

Q. Now, the effect of those two entries would simply show the relative difference between the balances of those accounts taking a view of them at the end of the year, 1868, and another view of them at the end of the year 1869, would it not?

A. Yes sir.

Q. And if that resulted in a credit balance, or a balance on the credit side, it would be carried into surplus by the transfer of profit and loss balance to surplus, would it not?

A. Yes sir.

Q. And if it represented a debit and the profit and loss balance was debit, or otherwise, when it was transferred it would decrease surplus to that extent, would it not?

A. Exactly.

1820 Q. So the simple effect of it was, was it not, to attempt to show by the amounts, the annual difference between those accounts as they stood on the books of the company?

A. That is what it showed in the surplus account, but at the same time the property on hand was not disclosed in any statement made by the secretary so far as I know.

Q. Well, the property itself was not disclosed.

A. No sir; the assets.

Q. But the surplus was disclosed, was it not?

A. Yes sir. The surplus fund was disclosed.

Q. And that surplus you found in checking over, correctly stated, didn't you?

A. Oh, yes sir, practically.

Q. Now, take it in 1870. Was not in 1870 profit and loss credited with exactly the amount that it was debited in 1869?

A. Yes.

Q. And was it not then debited also with the balances of those accounts as they stood at the close of 1870?

A. Exactly.

Q. Now, the effect of those entries was simply to carry into surplus the difference between those balances as they existed in 1869 and 1870, was it not?

A. Either way; the difference either way.

Q. The difference; if that was a credit it was carried in and if it was a debit it was carried in by the transfer of the profit and loss account to surplus; and the same thing was done in 1871 was it

not? In 1871, the profit and loss account was credited with the debits that were made to profit and loss in 1870.

1821 A. Yes sir.

Q. And profit and loss account in 1871 was debited with the balances of those accounts as they stood at the close of that year?

A. Yes sir.

Q. And the balance of profit and loss was carried into surplus, and the relative difference between those balances as between 1870 and 1871 went into surplus.

A. Yes sir, and varied the balance of surplus account by just that much.

Q. Now, in 1872, those accounts that we have been talking about—machine shop, material and wood, went into road and bridge material, didn't they? No, machine shop account didn't but wood account did.

A. In 1872 machine shop was charged out, $82,426.31

Q. Where did it go to?

A. It went to a pencil memorandum carried forward on top of the ledger page.

Q. Then how was wood account treated?

A. At the close of 1872 the balance of wood account is $5,583.92, and this is charged to profit and loss and not charged back, but carried on in a pencil memorandum.

Q. Take railroad iron, splices and spikes, which is another amount of the accounts included in this Exhibit 21.

A. At the close of 1871 the balance charged to profit and loss—in August 1872, this account was transferred to railroad and bridge material. November 30, 1872, the amount of $18,584.85 is charged back into railroad and bridge material account.

Q. Into railroad iron account?

1822 A. No sir, railroad and bridge material account. That becomes the railroad iron account, practically.

Q. When was that account opened, do you remember?

A. That was opened in 1872.

Q. Not the railroad iron and splice account?

A. No sir, the railroad iron and bridge material account.

Q. But that railroad iron account, when was it opened?

A. Oh, away back, in 1860 sometime or before that. No, I cannot tell from this when the account was opened.

Q. Well, the first trace of it that we have in profit and loss is in 1868, is it not?

Mr. KETCHAM: Well, it appears in 1863 on Ledger B., page 8, or page 6, I think it is from this exhibit. It is as far back as 1857 anyhow.

The WITNESS: That account opens as far back as 1852.

Q. That was the same old account that was transferred to construction.

A. Yes sir.

Q. And was carried forward afterwards.

Mr. KETCHAM: It was opened in 1852.

Q. And was all charged off to construction in 1856, I guess, was it not, and then opened again, virtually, or carried along.

A. The first appearance of that account in the profit and loss is in 1868.

Q. Yes, that was the first appearance. Now, Mr. Duy, besides machine shop account of which you have taken notice in this

1823 Exhibit No. 21, you mention cross-tie account. Now, was not cross-tie account treated exactly the same way with reference to its going into profit and loss account as machine shop account?

A. Yes sir.

Q. The balance at the end of one year would be debited to profit and loss.

A. Yes sir.

Q. And the next year that very balance that was debited would be credited to profit and loss and profit and loss would be debited with the balance of that account at the close of that last year?

A. Yes sir.

Q. Now, another one you mentioned in this exhibit is wood purchased account, and that is one we have been talking about in connection with machine shop account, was it not?

A. Yes sir.

Q. And it was treated, as we have said, just like machine shop account.

A. The same way.

Q. Railroad iron account is another one that you include in this exhibit, and it was treated in the same way as machine shop, wood and cross-ties accounts, was it not?

A. Yes sir.

Q. Mr. Duy, you never kept railroad books, did you?

A. No sir.

Q. You never had any experience then with these supply accounts as they are generally called, such as machine shop account, cross-tie account, wood account and railroad iron account?

1824 A. No sir, not in connection with railroads.

Q. Your experience in other lines of business leads you to believe, does it not, that any balance, book balance of a stock account does not represent necessarily with accuracy the true balance of that stock on hand.

A. A stock of merchandise?

Q. Yes sir.

A. No sir, not unless there is an inventory taken.

Q. Well, the book balance.

A. The book balance don't show it.

Q. The book balance would not show it. That is what I mean. It would take an inventory to ascertain the exact amount of stock on hand.

A. Yes sir.

Q. Now, you can see from the manner in which these ledger accounts, these ledger supply accounts, as I have called them, were made up, that with the debits and credits that they receive, the balance of any one of these accounts would not necessarily show accurately the real stock on hand, would it?

A. No sir, it could not.

Q. The machine shop account balance by itself would not necessarily show that the amount of material called for by the balance was really on hand.

A. No sir. If they had made money, the stock on hand would be larger than the balance, and if they had lost money it would be less.

Q. And the same way with cross-ties.

A. The same way.

Q. The amount that you paid out for cross-ties, which would be charged on the ledger to cross-tie account, and the credits
1825 would appear on that account for cross-ties taken or used, the difference between that debit and credit account would not necessarily indicate the number of cross-ties they had on hand.

A. Well, that would be rather a different account. That might be kept in a way that would show exactly what they had on hand, keeping a single article like that.

Q. That was the reason I asked you if you had ever had any experience with railroad books, because I do not know of anybody that has been able to keep cross-tie accounts that way.

A. Well, dealing with a single article that way it seems to me they might charge it with so many cross-ties at such a price and then credit it with what they used or what they sold.

Q. Suppose they didn't sell them.

A. Then they ought to have on hands what they haven't used.

Q. Well, the difference between what section men would report as put in the track, and what was lying on the ground at the side of the track would raise great confusion in your account.

A. Unless you had Mr. Peck to go along and count them; unless they had President Peck to go along the road and count them.

Mr. KETCHAM: Then there would be a bushel of difference.

Q. So that the putting by the secretary in his printed report, the setting forth of the ledger balances, of the balance of *the balance of* machine shop material would not necessarily show the true amount of material on hand, would it?
1826 A. I think not. I should think the material on hand would be larger than his balance generally. I don't suppose they worked for nothing.

Q. It was at best a book balance, was it not?

A. Yes sir.

Q. And a statement of assets based upon a book balance?

A. Yes sir.

Q. Now, if instead of taking that book balance each year which varied—might be less of an asset one year and more of an asset of

another—if instead of taking it that way you took it, as was done, by transferring those balances into profit and loss, would not find the variations in those accounts as between the end of one year and the end of the next, and get that annual variation, the variation for that year, into the surplus account.

A. Yes sir.

Q. And would not you get that variation into the surplus account just exactly the same way by the amounts published by the secretary in his ledger balances? Here is a ledger balance that shows sixty thousand dollars on hand of machine-shop material this year. The next year shows fifty thousand dollars on hand.

A. Yes.

Q. There is a reduction there of ten thousand dollars.

A. Yes sir.

Q. And your surplus had been reduced the last year to that extent, hadn't it?

A. Yes sir. It shows the variations on the surplus account.

Q. Now, if you had, instead of publishing those ledger balances, carried it and treated it in your profit and loss account,
1827 would not that same variation of ten thousand dollars have been felt by the surplus account when the balance of profit and loss was transferred to surplus?

A. If you did not transfer it backward and forward the profit and loss account would not show in the surplus account at all, and your ledger balance would show the stock on hand as an asset.

Q. Would not it effect your surplus in the ledger balance?

A. Yes sir, it would effect them.

Q. Would it not effect them just exactly the same way?

A. Just exactly by those same variations it effects your surplus all the time.

Q. And it was effected in exactly the same way by the entries he made in profit and loss?

A. Yes sir.

Q. Surplus was?

A. Certainly.

Q. Did you take trial balances each year through this whole term which you investigated?

A. Yes sir.

Q. Did you compare those trial balances with the ledger balances that were published by the secretary?

A. Yes sir.

Q. Did you find those ledger balances published correct?

A. Practically so. There were some variations.

Q. In small amounts you mean?

A. Yes sir.

Q. And if there are any that you have in mind, I would be glad to have you mention them.

A. There is a slight difference in the ledger balance of 1851.

1828 Q. What do you mean by slight?

A. There is four hundred and some odd dollars; I don't remember now what it was, but it is straightened afterwards.

Q. It was straightened?

A. Yes sir; in 1853 it agrees, and in 1854 it agrees—in 1853 it agrees, but in 1854 the secretary omits $17,430. from both sides of his balance sheet as published.

Q. Is that the item growing out of the inventory of machine shop material?

A. No sir, that is a debit on one side to Farmers' Loan & Trust Company and credit on the other side to the coupon account, the presumption being that the money was in New York to pay the coupons. It would not effect the books at all. And the same thing occurs in 1855. In 1855 he omits from the credit side of coupon account $1,365., and from the debit side Farmers' Loan & Trust Company, $1,438.56, and he adds the difference, $73.56 to the cash balance.

Q. That made it all right.

A. That made it all right, yes sir. And in 1856 there is the same omission on both sides; in 1857 he omits on both sides; in 1858 it agrees; in 1859 he omits from both sides; in 1860 it agrees; in 1861 and 1862 and 1863 and 1864 and 1865 and 1866 and 1867 and 1868 it is all right, and in 1869 and 1870 and 1871. In 1872 there is a very great difference. In 1872 there is large difference.

Q. Difference in what?

A. In the amount of the balance sheets, in the aggregate of the debit and credit sides of the balance sheets of the secretary and ours.

1829 Q. Well, give us what there is of it? Explain it.

A. That I cannot do.

Q. You can explain the difference; that is, you can tell us the difference.

A. The aggregate of the balance sheet as made by us is $4,403,525.45 and the aggregate of the balance sheet as published by the secretary is $4,577,637.64. The difference is $174,112.17

Q. That is the secretary's is that much larger than yours?

A. That much larger, yes sir. And the reconcilement of those sheets, on the debit side there appears an item of St. Louis.Vandalia and Terre Haute construction, $188,941.55; on the secretary's, and the item of mail service, the secretary has $7,257.49, and the books show $2,635.95, a difference of $4,621.54; there is an item of open accounts on the secretary's report, $31,080 28, and the books show $17,505.55; the difference is $13,574.73; material on hand, $23,113.40 on the secretary's report; that makes a total of $230,251.22. The books show balance in the treasurer's hands $120,196.94, and the secretary reports $64,057.89; there is a difference of $56,139.05, which deducted from the $230,251.22 leaves $174,112.17, and reconciles the debit side. On the credit side the secretary's report shows St. Louis, Vandalia and Terre Haute rent account $85,780.64; ditto, income account $78,090.17 accounts payable, the secretary's report, $34,343.99; the books show $24,102.63, a difference of $10,241.36, which, added to the other items, make the total of $174,112.17 on the credit side. Some of

those accounts, the St. Louis, Vandalia, the construction account
1830 and the rent account and the income account don't appear on the books that were given us, that we had to examine at all.

Q. What accounts do you say did not appear on the books you had?

A. The St. Louis and Vandalia, the rent account, the income account and I think the construction account.

Q. What was the surplus as shown by the secretary's book, I mean by the secretary's report, as compared with the surplus shown by the books.

A. The same as ours $1,186,143.12

Q. So that the variation in the accounts as published by the secretary balanced each other on either side.

A. Yes sir.

Q. And brings the result the same, brings the final result the same.

A. Yes sir, capital stock the same, surplus the same.

Q. And assets the same, except as to those accounts?

A. Except as to those differences on either side. I suppose there are some accounts connected with the running of the leased line that he kept in some other place on the books.

Q. I think they started to keep those books separately, but they afterward kept them together.

A. The charter required that they should keep the accounts separate—the lease, I mean required that they should keep them separate.

Whereupon, the hour of five o'clock having arrived, the further hearing was adjourned until Monday October 30, 1899, at 10 o'clock a. m.

1831 MONDAY, *October* 30, 1899—Ten o'clock a. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, with the exception of Judge Robert S. Taylor of counsel for plaintiff, and Lawrence Maxwell, Esq., of counsel for defendant.

The cross-examination of the witness, GEORGE C. DUY, was resumed, as follows:

Questions by Mr. JOHN G. WILLIAMS:

Q. Mr. Duy, I want to look a little bit further into the method of handling those supply accounts and would like to have you turn to the printed report of the secretary for the year ending November 30, 1868, on statement B, appearing on page 10 of that report, you will find a debit item, increasing supplies on hands, $9,075.08 When we were going over the transportation receipts and expenditures year by year that item was, as I remember, mentioned but not explained at the time. Can you tell me now why the increase of supplies on hands is put there as a debit item?

A. Does that appear in the transportation account? You say that appears in the transportation account?

Q. No; I say when we were going over the matter of receipts and expenditures that item was mentioned but not explained. We passed it by. No, it does not appear in your transportation.

A. In your introduction you said going over transportation matters, I think.

1832 Q. My recollection is we simply noted that there was an item of expenditure, and we did not explain it at the time, and I did not embrace it in the aggregate of expenditures that I asked you to make.

A. I cannot tell you now where that comes from.

Q. I will call your attention to some few things, and perhaps that will enable you to get at the reason for it. These supply accounts, such as machine shop material, wood cross-ties and railroad iron, about which we had something to say last Friday, previous to 1868, were taken care of on the credit side of this general account, as published by the secretary, were they not? The balance of those accounts, in other words, appeared as ledger balances.

A. Yes sir.

Q. I think he dropped them first in 1868, didn't he; do you remember?

A. He made the first charge off in 1867, I think.

Q. The first charge of those accounts to profit and loss, to debit of profit and loss was made in 1867; and I do not think the ledger balance in 1867 showed any of those accounts. You will find it——

A. I would like to be certain about that.

Q. You will find it on page 9 of the annual report for 1869. There you will see that those accounts were not shown in the balance of the ledger statement.

A. The first charge out is November 30, 1867.

Q. Now please look at the secretary's report for 1867, being statement No. 2, on page 9, of the annual report for 1867, and see if you find any of those accounts in the ledger balance as given by him for that year?

A. No sir; they are taken out and charged to profit and loss.

1833 Q. Now, look at the ledger balance for 1868, as given by the secretary, on page 11 of the annual report for that year, and see if they appear there.

A. They do not.

Q. Now, suppose the ledger balance of those supply accounts for the year ending November 30, 1868, were greater than they were for the year 1867, would not that excess be properly treated as an expenditure?

A. It would vary the balance of the profit and loss, or the surplus account, to the amount of the difference, and would necessarily appear in the expenditure side in order to balance the accounts. Whether it would necessarily show an increased expenditure, or

whether it would necessarily show the expenditure that year or not, I am not prepared to say.

Q. Would it not indicate that the stock represented by these supply accounts had been increased during the year, and would not that increase presumably represent an expenditure made to obtain it—that increase of stock would naturally suggest an outlay, would it not?

A. Yes.

Mr. KETCHAM: Does that "yes" apply to the whole question, or only to the latter part of it?

The WITNESS: The latter part of it.

Q. Well, that outlay would mean about the same thing as expenditure, would it not?

A. He charged off one year, profit and loss, a certain amount of those various items, and at the end of that year he put them back again. That leaves him in precisely the same condition on his books as he was at the beginning of the year. Now, at the
1834 end of that year he foots up his debits and credits, the debit and credit side of those accounts, and if the debit side were more than they were the year before it would indicate an increase of supplies; and if the debit side were less than they were the year before it would indicate a decrease. The indication of an increase of supplies would mean that they had accumulated that much more supplies in some way, and would probably go in here nominally as an expenditure; it would necessarily go in here, in order to balance the account, in some shape.

Q. What I meant to direct your attention to was the propriety of treating it as an expenditure.

A. Yes sir, that would be right, in making this statement.

Q. Now, if at the end of a certain year the debit balances of those supply accounts were less than they were the previous year, it would indicate, would it not, that they had used these supplies to a greater extent than they had replaced them during the year.

A. Yes sir.

Q. And that would properly be regarded, from a bookkeeper's standpoint, would it not, as an income for that year—, as equivalent to an income for that year?

A. As equivalent to an income, yes sir.

Q. That is it saves them, presumably, the expenditure of that amount of money to purchase those supplies which they had used, and thereby decreased the balance.

A. And, therefore, the way that he did this thing, charging off and charging back in order to make this statement of income and expenditures balance, he has got to put that in there on one side or the other; but after all, I cannot see any reason for those
1835 entries at all. I cannot conceive of any bookkeeper's reason for making those entries.

Q. I do not know that we have to do particularly with his reasons.

I am only dealing with the result of it. I want to see what the result was.

A. The result of those things is, to my mind the result of those transactions is, to vary each year the balance of the surplus account, one way or the other, by the difference between the aggregate of those other balances.

Q. Undoubtedly.

A. And that would have been arrived at, precisely the same thing, by letting them alone in their original accounts.

Q. I think so too. I think the same result was reached as if he had left the accounts as they were before.

A. Excepting that all the time his reports don't show any stock of material on hand.

Q. I understand that is what you said on Friday, that an itemized statement of those assets didn't appear in the ledger balance as they had formerly done.

A. No, it don't appear in the ledger balance that they had got any of this material on hand, at all, or any of this property on hand; it is all wiped out.

Q. But that, I understand, as you say, and as I understand you still say, did not affect the surplus.

A. It did affect the surplus, each year.

Q. I mean differently from what it would have been if it had been done otherwise.

A. Surplus would have stood as without any reference to these things at all, except so far as the actual expenditure of money
1836 and the actual receipts would go. You treated this thing the other day as earnings, spoke of it as earnings.

Q. Of course; I am coming to that.

A. It is not earnings.

Q. I am coming to that in a moment. But suppose his ledger balance had been shown in his ledger balance statement each year, and those balances varied each year, would not that variation appear in the surplus?

A. Yes sir, it would appear in one side of the surplus, and on the other side in these things on hand.

Q. But that same variation was reached by passing these accounts through profit and loss?

A. Yes sir.

Q. Why he did it, why he passed them through profit and loss, I am not trying to tell, or to suggest, because the same result would have been reached as if he had maintained the old system of the former secretary and left these balances in his ledger balance statement. Now, this debit for the year 1868 of $9,075.08 for increase in supplies on hands, indicates, does it not, that the balance of those supplies, as they stood, at the last of 1868, was that much greater than those same balances as they stood at the end of 1867?

A. Yes sir, I think so.

Q. Now, we will turn to the year eighteen——

A. I would like to prove that.
Q. Sir?
A. I would like to prove that.
Q. Well, you can do it if you take the time. Yes, go on. Can you make it?
A. No sir, I do not make it exactly.
Q. How much are you out?
1837 A. Well, in 1867, he charged off $61,604.31
Q. And $23,160.
A. Well, I am just looking at machine shop.
Q. Well, you will not get it from that alone. You will get it from all of those supply accounts.
A. That year he only charged off two.
Q. Wood and machine shop?
A. That left $84,764.31. The next year he charged off $52,207.04 and from wood account $18,077.80. That makes ninety thousand dollars, and it will not prove—$90,284.84
Q. Well, what is the difference?
A. $5,520.53
Q. You mean it lacks that much of proving?
A. That is the difference between what he charged off in 1867 and 1868 in those two items. They may be accounted for in some way.
Q. Well, there is $9,075, and you got five thousand what?
A. $5,520.53

Mr. WINTER: Was there any other item charged off in 1868, except machine shop and wood?
The WITNESS: That is all wrong. Those figures that I gave you were all wrong.

Q. I was afraid they were, but I thought I would let you work it out that way.
A. I don't see where that comes from Mr. Williams.
Q. Suppose we pass that. I am quite sure it can be made to balance, but I haven't figured it.
A. It stands fourteen thousand and odd dollars, the other way on those two items.
1838 Q. We must not take those two items alone.
A. That is all there were in 1867 and 1868.
Q. That increase of surplus does not represent only those two items.
A. The other accounts were closed at the end of 1867 by charging to repairs of roads, absolutely closed out.
Q. The others were?
A. Yes sir, railroad iron and cross-ties were charged out to repairs of roads at the end of 1867, and the whole business, and a new account opened.
Q. Undoubtedly the method of reaching it can be learned, and it must be there from the figures in the itemized statement, because the account balances in the end, and we will get at it later. Now

turn to the secretary's report for 1869, please, and look at statement B, on page 12 of the annual report for that year.

A. Yes.

Q. You will find there under the head of materials sold, $11,321.84 We found on Friday, did we not, that that represented the difference between the aggregate balances of these accounts for the years 1868 and 1869— don't you remember whether we did or not, Mr. Duy?

A. Yes sir.

Q. We figured it all out, and I gave you the items.

A. That is true. I don't remember whether we found it so, but it is true.

Q. Now, in that year 1869, the balance of those supply accounts were less at the close of 1869 than they were at the close of 1868 were they not?

A. Yes sir.

Q. Less to the amount that the secretary gives as a receipt for the year 1869, namely: $11,321.84

1839 A. That is right, $11,321.84, yes sir.

Q. Now, inasmuch as those supplies had been reduced during that year ending November 30th, 1869, the secretary treated it as an income?

A. Yes.

Q. To the extent of the reduction. Now, that would be proper as a bookkeeping entry. Would it not?

A. Well, it seems as though the result would be proper in the way he has made his statement, but it don't seem to me to be a proper way to do it.

Q. Well, inasmuch as you have much less supplies on hand at the end of the year 1869, than you had at the end of the year 1868, the presumption is that they went into use during that year?

A. Yes sir, that would be the presumption here. There was that much more used than he bought.

Q. And that is deducting your stock you had availed yourself of the benefit of that stock to the extent of its reduction, thereby saving yourself the outlay that year for the amount of that stock, thus used.

A. Yes, you save yourself the outlay, but I don't think that is equivalent to getting yourself an income.

Q. Neither do I; I agree with you there.

A. That is what is before my mind all the time.

Q. And in making up an income account, I do not think that anybody today would treat such a matter as an item of income for the year, but the secretary did treat it in that way, or seemed to treat it in that way by putting it in a general account, under the head of receipts.

A. Yes sir, that is the way he has done it.

Q. Up to the time, up to this year 1869, there had been no

1840 such thing as an income account made, had there?

A. No sir.

Q. Not as we understand income today.

A. There is not any income account on the books, either. This is simply a statement made up from the other account.

Q. Well, they don't make up income accounts and put them on the books, even today, but we state income from the books, what is regarded by men as income.

A. The language is misleading, too. He says, "material sold." He is not keeping the shop. I do not see that it indicates that they sold material. They didn't sell cross-ties, nor they didn't sell railroad iron.

Q. They sold it to themselves.

A. Yes, they did that.

Q. That is, those accounts sold it to the company.

A. Yes.

Mr. KETCHAM: In other words, the transaction was a sell.

Mr. WLILIAMS: Yes sir, we bought and sold from those accounts.

Q. Well, the theory of every stock account is that stock account is debtor to what is furnished it, is it not?

A. Yes sir.

Q. And it has credit for whatever anybody takes from it?

A. Yes sir.

Q. And the company took this stock from those stock accounts, and the stock account got credit for it, and the company got the use of what they took in some of its departments; but if they
1841 didn't get the use of that stock on hand, they would have had to, or probably would have made an outlay for other stock.

A. Yes sir.

Q. And it was in the sense of income in that it saved an outlay?

A. Yes sir.

Q. But if a man was looking for cash to come into his pocket, that he might spend for something else, what we naturally think of as income now, he would not have got much by using up the stock he had on hand. Now turn to the year 1870, and look at the secretary's statement B, appearing on page 9 of the annual report for that year, and see if you do not find there a debit item for increase in supplies on hand $6,138.50?

A. Yes sir.

Q. Now, that indicates, does it not, that the stock increased during the year?

A. Yes sir.

Q. Over and above what it was at the close of the year 1868?

A. Yes sir, it indicates and is true that the balance of those accounts were larger, and larger by that amount, $6,138.50

Q. Now, take the year 1871, please, and turn to the secretary's report, statement No. 2, as it appears on page 10, of the printed annual report for that year, and see if you do not find there an item of materials sold under the head of receipts amounting to $36,786.30?

A. Yes sir.

Q. Now, that indicates, does it not, that the balance of those
1842 supply accounts at the close of 1871, were that much less than they were at the close of 1870?

A. Yes sir, but it is not the difference between the charges of the two years.

Q. Yes, we figured all that out Friday. I think I can give it to you from my memorandum. Have you your profit and loss account there?

A. I can get it.

Q. I gave you the items from that, and here they are; I have my memorandum of it.

A. What were they?

Q. On the credit side of that account there was, iron splices, and so forth, $21,832.13

A. Yes.

Q. Wood, $38,667.20

A. Yes.

Q. Ties, $7,221 56

A. Yes.

Q. Machine shop material, $72,581.32

A. Yes sir.

Q. That is on the credit side?

A. That makes $140,302.21

Q. That is right. Now, the debits are as follows: Iron splices and so forth, $15,584.85

A. Yes.

Q. Wood, $9,000

A. Yes.

Q. Ties, $1,200

A. Yes.

Q. Machine shop material, $73,735.41.

A. Yes.

Q. Repairs, bridges, $995.65 Those were the debits.

A. I haven't got that in my account at all.

1843 Q. You have it on your profit and loss account.

A. Yes sir, but it is not one of these things that was charged out and charged back.

Q. Sir?

A. It is not one of those items charged out and charged back; it ought not to be in there.

Q. But it is in your profit and loss account—you mean repairs of bridges?

A. Yes sir.

Q. Yes, it shows in your profit and loss account for 1871.

A. How much do you say it is—$995.65?

Q. $995.65. You will find it near the middle of the upper half of page 13, Exhibit 48, November 30th, eighteen——

A. Well, it is bridge material,

Q. I beg your pardon, it is on page 12; I was giving you 1872; it is on page 12 of Exhibit 48, on the debit side of profit and loss

for the year 1871, and reads as follows: "November 30, 1871, repairs of bridges account, 1872, transferred, $995.65."

A. Yes.

Q. That inured to the debit of profit and loss for the first time that year; it had been among the accounts formerly transferred?

A. I see. That makes the balance $36,786.30

Q. The same as the secretary has it credited as a receipt for that year?

A. Yes sir.

Q. You did not give it, but it necessarily follows that the aggregate of those debits that I gave you were what?

A. $103,515.91

1844 Q. The secretary that year then treated a decrease in these supply accounts as a receipt and income?

A. Yes sir; let me look a moment further (After referring) That is right, I guess.

Q. This new method of stating these accounts, and of keeping them on the books, was coincident with the advent of Mr. Morris as secretary, was it not?

A. I cannot answer that off hand.

Q. You will find it there, you did the other day, that Mr. Wood died in 1866, and that Mr. Morris came in as secretary.

A. Yes sir, I think that is so; I remember.

Q. You read a portion of the report the other day, where the board had regretted by its resolution the death of Mr. Woods, who had been its only secretary up to that time.

A. Yes sir.

Mr. KETCHAM: It was at the same time as the change in the presidency.

Mr. WILLIAMS: No sir, the president was changed in 1867. Mr. McKeen came in in June of 1867, and Charlie Wood died in June of 1866, a year before.

Mr. KETCHAM: This change that has been spoken of took place in 1867, and not in 1866.

Mr. WILLIAMS: Yes sir, Mr. Morris was secretary for the first time that year.

Mr. KETCHAM: There was no change made in 1866. The change was made in 1867.

Mr. WILLIAMS: I really think Morris acted as secretary
1845 for the balance of the year 1866, because he signs the report of that year as secretary.

Mr. KETCHAM: The change was therefore not coincident with the change of the secretary but coincident with the change in the presidency?

Mr. WILLIAMS: No sir, they were not in one way any more than the other. The first year that Mr. Morris made up a report as secretary for the full year was in 1867, and in that year this change occurred. Mr. McKeen did not come in as president until the middle of 1867.

Mr. KETCHAM: But Mr. McKeen was president during the year when the report was made in which the changes were made.

Mr. WILLIAMS: Half of it, yes sir.

Mr. KETCHAM: Mr. Morris had been the secretary who made the report, the other secretary having died before the time of making the report, during the year preceding the year in which any change was made.

Mr. WILLIAMS: I think he made up the reports—he seems to have done so—for 1866. Mr. Wood having filled the office more than half of that year before his death.

The WITNESS: We could get the date of the election of Mr. Morris from the record without any trouble, but it is apparent that Mr. Morris made up the accounts in the year 1866 and signed the report as secretary, and he undoubtedly made up the books just as they were kept to the end of that year, and then in 1867, he made up his report at the end of 1867 in his own way, although the
1846 books were kept in the same way during 1867, the same accounts were run; when he came to make up his statement he adopted the new method.

Q. And made them up in a different way. The Exhibits Nos. 14 to 19, both inclusive, deal with the investments in stocks and bonds of other companies?

A. Yes.

Q. Do you give in those exhibits merely the book entries connected with these transactions, or do you give anything of history of them outside? I mean by the books, the journal and ledger.

A. Yes, sir, in Exhibit No. 14 there are two notes at the bottom of page 2, which appear to be statements of ours. All the rest of the exhibit appears to be simply transcripts from the books. Exhibit No. 15, at the top of page 1, is a recital of facts taken from record A, dated May 9th, 1860, and at the bottom of page 2 there is a note of ours marked "Note."

Q. "That the balance remains the same until May 1879."

A. Yes sir, and the remainder of that exhibit appears to be a transcript from the books.

Q. Now, take this Exhibit No. 14. That shows the manner in which this stock was acquired, don't it?

A. Yes sir.

Q. The Evansville & Crawfordsville Railroad Company became indebted for some office furniture, safe, freight and charges, didn't it?

A. Yes sir.

Q. And then Vigo County bonds were sold by order of the board of directors of the T. H. & I. R. R. Company, and stock in the Evansville & Crawfordsville was taken?
1847 A. Yes sir.

Q. And those items were?

A. They amounted to $11,655. Stock was taken for $11,650, and they paid cash $5.

Q. Now, what is the transaction, as shown following that, on page 1 of that exhibit, the Terre Haute & Richmond road sold some——

A. Sold some equipment, $9,000—wait a moment—the first item to the credit of E. & C. Railroad Company stock, $11,650, then the T. H. & I. sold them equipment amounting to $9,000, and took stock for it, and then, there is a credit to profit and loss for seventy-five shares of stock, being for interest on the stock which they already held and that amounted to $3,779.89; and then there is a credit for stock bought, $1,115, and the total amount is $25,544.89

Q. Now, that stock bought, when was that entry made?

A. January 22nd, 1867.

Q. What is the entry?

A. Two bills payable for stock purchased by Mr. Peck, March 18th, 1867, one hundred and sixteen shares, par value fifty dollars, amount $5,800, bought by Peck with the funds of the company, same ordered to be transferred to the company. See record, November 27, 1866, folio 55.

Q. Now, that "see record, November 27, 1866, folio 55," is your notation, or is that the journal?

A. I don't remember. I can tell you in a moment. (After referring.) No sir, it is the journal, and it gives the names of the parties from whom the stock was purchased and the price paid, one hundred and sixteen shares, averaging nine dollars and sixty-one and one fifth hundredths.

1848 Q. That is $9.61 paid for it per share of fifty dollars, par value?

A. Yes sir.

Q. Then the other stock was acquired in 1868, was it not?

A. Yes sir; and then there is a counter-entry there, if you want the account to show, it ought to go in.

Q. I do not care about getting at the balance. The counter-entry to which you refer is the reduction in the valuation of the stock, as it appears on the book, made by order of Mr. McKeen, president, in 1867.

A. Yes sir.

Q. I had in mind principally the acquisition of the stock; that is what I was getting at.

A. Yes sir.

Q. Then, there was some more stock acquired in 1868.

A. In 1868, yes sir, $9,206.

Q. That was stock turned over to the company by W. R. McKeen, president, was it not?

A. Yes sir.

Q. And how many shares of it was there? You don't show that on your exhibit.

A. One thousand and eleven shares.

Q. And what was the average price per share paid for it?

A. That requires some figuring.

Q. Can not you take it by dividing the total amount paid by the total number of shares?

A. Yes sir, that is what I am doing. Nine dollars and ten and six tenths cents, I make it.

Q. Now, the next stock purchased was in 1872, was it not?

A. Yes sir, September 28th.

Q. And after that December 9th?

A. December 9th.

1849 Q. And the total amount of that purchase, those two purchases was $28,664, is it not?

A. Yes sir.

Q. And represented seventeen hundred and seventy-nine shares?

A. Yes sir.

Q. You have a note at the bottom of page 2, there, indicating an additional purchase of this stock in 1875?

A. Yes sir.

Q. And in April, 1879, a credit to profit and loss of $81,129.87

A. Yes sir.

Q. Does that credit arise out of the sale of the stock?

A. I think so.

Q. And it showed——

A. As a matter of fact that stock rapidly appreciated in value after that time, and came up very near to par, I think.

Q. After 1879?

A. About that time; along before that time.

Q. Now, the transaction in Evansville & Crawfordsville Railroad Company's extension bonds grows out of the fact that the Terre Haute & Richmond Railroad Company supplies the iron for that extension, does it not?

A. Yes sir.

Q. And that indebtedness was paid?

A. The aggregate of that indebtedness was $95,004.50 The E. & C. Company extension paid $54.50 cash and the T. H. & I. took in settlement of the balance Evansville & Crawfordsville Extension bonds for $94,950, in 1861; and those bonds were taken at ninety cents. I stated awhile ago that I thought the credit

1850 of $81,129.87 was made on the Terre Haute & Evansville stock.

Q. Evansville & Crawfordsville stock.

A. Evansville & Crawfordsville stock, from a sale. That is not true. June 4th, 1879, page 613 of Journal C, shows that it was a credit to profit and loss for the value of the stock, as shown by the general—the difference between the value of the stock as shown by the general books and the market value at this date.

Q. They increased the valuation of it as it appeared on the books.

A. Increased it by an entry.

Mr. KETCHAM: They had some lots to sell and they put up the price.

Mr. WILLIAMS: I don't think that was sold as early as 1879?

Q. Now, in Exhibit 16, you give a statement of loans to the Indianapolis & Cincinnati Railroad Company.

A. Yes sir.

Q. You show a loan of $50,000 in 1862 and payment of that loan by fifty bonds of the Cincinnati & Indiana Railroad Company in 1863?

A. Yes sir.

Q. And you say immediately after the entry stating the loan "For object of this loan, see president's report of December, 1862, page 11." Will you please read what you refer to there.

A. (Reading:) "To many of the stockholders it is known, that from Indianapolis to Cincinnati there is no railroad that
1851 enters the latter city by its own track. The Indianapolis & Cincinnati railroad, terminates at Lawrenceburg; from this point, it uses by means of a third rail, the track of the Ohio & Mississippi railroad and by contract with this company, is prohibited from soliciting business from Cincinnati for points to which the Ohio & Mississippi railroad is the direct line; thereby preventing a large amount of business from Cincinnati, over the Terre Haute & Richmond railroad, and its connections. The Indianapolis & Cincinnati Railroad Company have taken measures through a company organized as the Cincinnati & Indiana Railroad Company, to build a road from Lawrenceburg to Cincinnati, a distance of twenty (20) miles; the new road to be used permanently to, and operated by the Indianapolis & Cincinnati Railroad Company. Viewing the building of this twenty miles of road to be of great importance to the Terre Haute & Richmond railroad, we have loaned fifty thousand dollars ($50,000.) to carry this into effect. This amount is secured to the company by the Indianapolis & Cincinnati Railroad Company, they paying interest at the rate of seven (7) per cent. per annum, this company having the option to take seven (7) per cent. bonds, to be issued by the Cincinnati & Indiana Railroad Company, should it so elect."

Q. Those Cincinnati & Indiana bonds were finally closed out, were they not, in 1869?

A. Yes sir.

Q. And what was realized for them?

A. $41,826.25.

Q. And what was the valuation put upon them in 1867
1852 when the securities held by the company were revalued?

A. Forty thousand dollars.

Mr. HAWKINS: What was the date of this purchase?

Mr. KETCHAM: The purchase was in 1862.

The WITNESS: In 1863 the bonds were turned over.

Mr. WILLIAMS: The loan was made in 1862, and the bonds were turned over in 1867. Is not that right, Mr. Duy?

The WITNESS: Yes sir, that is right.

Q. Now, Exhibit No. 17 deals with the transactions between the Terre Haute & Richmond road and the Terre Haute, Alton & St.

Louis Railroad Company. Now, that transaction appears correctly stated, does it not, in entry that you gave from the Journal B, on page 165?

A. Yes sir, that is quoted.

Q. It is an entry from the journal, is it not?

A. Yes sir.

Q. What is it?

A. The whole entry?

Q. Yes, please; that is, the explanatory part of the entry.

A. Terre Haute, Alton & St. Louis Railroad Company debtor to treasurer, for the following acceptances held by him taken from the T. H. & St. L. R. R. Company, on settlement of orders of their freight agent for freight and charges delivered to the said R. R., some of which having become due and remaining unpaid a contract was made dated St. Louis, November 14, 1857, by which said R. R. Co. agree to pay to the T. H. & I. R. R. Co. $2,500 weekly
1853 until the indebtedness is paid. The acceptances herein enumerated are held as collateral, to-wit."

Q. Now, what did they amount to?

A. 61,589.04

Q. Now, that account was increased later on, was it not, in 1858?

A. Yes sir.

Q. Leaving out any items of exchange, what items increased the indebtedness as shown on page 2 of the exhibit?

A. Leaving out the interest?

Q. Yes, leaving out the interest and exchange; I just want to get the principal items.

A. Work done in machine shop, August 1857, to March 1858, inclusive, $413.71; orders of J. A. Hill, freight agent of the T. H. A. & St. Louis, taken in payment of freight, heretofore held by the treasurer as cash, $18,337.80; C. W. Mancourt's draft on Thomas Allen, dated June 7th for $3,984.43; work in machine shop in May, and protest, $26.02; shop bill, from June to September, $241.34

Q. Now, the total amount of that indebtedness up to the close of 1858, was what?

A. $85,209.31

Q. There were items of debits and credits both during the year 1859, were there not?

A. Yes sir.

Q. And then a judgment was taken for the balance of the indebtedness was there not, in Vigo circuit court?

A. Yes sir; it was merged into notes first.

Q. And then went into a judgment?

A. And then went into a judgment.

1854 Q. And then that judgment was settled how?

A. By an acceptance of bonds.

Q. St. Louis, Alton & Chicago bonds?

A. Yes sir.

Q. To the amount of what—to what amount?

A. $94,552.59
Q. And when were those bonds sold?
A. In October, 1863.
Mr. KETCHAM: 1863 or 1862?
The WITNESS: 1863.
Q. And what was the loss on them?
A. $6,651.85
Q. Exhibit 18 deals with the transactions of the company in St. Louis, Vandalia & Terre Haute securities?
A. Yes sir.
Q. Those transactions begin at what date?
A. March 1869.
Q. In your investigation of the books that were submitted to you did you find any explanation of the origin and reason for those transactions?
A. Yes sir.
Q. Where did you find it?
A. I found it in the record.
Q. Did you find anything more than what you have given in this exhibit?
A. Oh, yes sir.
Q. Did you find anything in the annual reports?
A. I do not remember. I think there is a great deal about it in the record, a long contract set out with the other roads.

1855 Mr. KETCHAM: There is a great deal about it in these reports. There is a good deal said about it in the Supreme Court of the United States Reports.
The WITNESS: That I didn't read. I find in the annual report for 1868 on page 1——
Q. For the year 1868?
A. Yes sir.
Q. Please read what you find there, beginning with the paragraph "In order to maintain the business of the road."
A. (Reading:) "In order to maintain the business of the road it has been found necessary to complete it as authorized by its charter, from Terre Haute and Illinois line, and to aid in the construction of a connecting road to St. Louis. On the 11th of March last an agreement was entered into by this company, the Pennsylvania Railroad Company, the Pan Handle Railroad Company, the Steubenville & Indiana Railroad Company Columbus, Chicago & Indiana Central Railway Company, to aid in the construction of the St. Louis, Vandalia & Terre Haute railroad. By this agreement the several companies agree jointly to guarantee the bonds of said company, amounting to $3,216,000, and purchase at par $1,000,000, of their second mortgage bonds, convertible into stock of the company. The liability of this company by the terms of the agreement is limited to one-fifth."
Q. Now, please turn to the annual report for the year 1869,
1856 and read what you find there beginning at the last paragraph on the bottom of page 5.

A. (Reading:) "The extension of the road to the Illinois State line, to connect with the St. Louis, Vandalia and Terre Haute railroad, was commenced in May, and the grading, small bridges, and culverts will be completed about the first of February. A contract was made with the Keystone Bridge Company to erect an iron bridge eight hundred and thirty feet in length, for the sum of seventy-five thousand dollars. The masonry work is being done by the company, under the supervision of Mr. A. B. Cook, of Steubenville, and is completed with the exception of the west abutment. It is expected that the bridge and track to the State line will be in readiness for the passage of trains by the 1st of April next.

The distance from the present terminus of the road to the State line between Indiana and Illinois, where it connects with the St. Louis, Vandalia and Terre Haute railroad is seven miles. By availing ourselves of the canal grade, seven-eighths of a mile was constructed through the city of Terre Haute to the Wabash river at comparatively light cost. West of the river, the line crossed a low bottom for about six thousand feet, requiring an embankment of an average height of eighteen feet; from that point to the State line the country is very broken and construction expenses:—one cut about twelve hundred feet in length and fifteen feet in depth of rock, another of about the same length and twenty-five feet in depth which required blasting, making the work expensive. The estimated cost of the extension to the State line is three hundred and seventy-five thousand dollars, as follows:

1857	Gradation	$120,000.
	Wabash bridge	150,000.
Sugar Creek bridge		15,000.
Wooden bridges		6,000.
Fish splice rails, 64 lbs. to the yard		60,000.
Ties, bolts, splices, spikes and track laying		24,000.
	Total	$375,000.

To enable the company to procure means to make the extension above named, construct branches and double track, it was deemed advisable to issue bonds of the company. An order was accordingly made authorizing an issue of eight hundred thousand dollars payable in ten years, bearing seven per cent. interest, principal and interest payable at the Farmers' Loan and Trust Company in the city of New York. Of these three hundred and forty-eight thousand dollars had been disposed of at fair rates, and it is now found that the sale of two hundred and fifty-two thousand dollars additional will furnish means sufficient to meet the wants of the company, thus making the bonded debt but six hundred thousand dollars.

The St. Louis, Vandalia and Terre Haute railroad was completed to Effingham, at the crossing of the Chicago branch of the Illinois Central railroad in July last, and the balance of the road to the State line was put under contract in April, and the grading and bridging

are now very nearly completed. It is expected to pass trains over
the entire line from Terre Haute to St. Louis by the first of
1858 May. When completed, the distance between St. Louis and
Terre Haute will be one hundred and sixty-five miles, twenty-four miles less than by the St. Louis, Alton and Terre Haute railroad. A favorable lease for the term of nine hundred and ninety-nine years having been effected for this short line road, we will be enabled to operate the entire line from St. Louis to Indianapolis as one continuous line, and advantageous running arrangements with the Pennsylvania interests east of Indianapolis place us in a position to compete successfully for all through business with all great East and West lines.

The leases of the St. Louis, Alton and Terre — railroad, viz: The Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company and the Pittsburg, Ft. Wayne and Chicago Railway Company are constructing a road from Terre Haute to Indianapolis parallel with ours, and from two to six miles north, which will be completed during the coming summer. This line will not be shorter than ours, and thus we lose none of the twenty-four miles gained by the St. Louis, Vandalia and Terre Haute line. The completion of this road will make two through lines from St. Louis to the eastern cities by the way of Terre Haute and Indianapolis, and to some extent divide the through business, which this company has enjoyed heretofore exclusively. The route by the St. Louis, Vandalia and Terre Haute, Terre Haute and Indianapolis, Columbus, Chicago & Indiana Central, Panhandle & Pennsylvania railways being the shortest and most direct between the East and the West, and their
appointments and facilities being equal to any other line,
1859 must be the favored route for passengers and freights, and we
are confident that our road will be able to retain a large share of the through business, which, with the increasing local traffic we anticipate will compensate for any loss of through business, and that the business and prosperity of the company will continue to increase.

The importance of our line, stretching almost due east from St. Louis to a distance of two hundred and thirty-eight miles, can readily be seen, and can scarcely be magnified. Connecting at the rapidly growing city of St. Louis, with the extended network of roads centering there, and at the eastern end with powerful allies controlling the shortest lines to tidewater, it gives abundant promise of a prosperous future."

Q. Mr. Duy, Exhibit 19, deals with the Indianapolis & Madison Railroad Company's income bonds and preferred stocks. Do the books and records you have examined throw any light on thaa transaction other than what you give in this exhibit?

A. Yes sir, I think they do.

Q. The transaction began in 1856, did it not?

A. Yes sir.

Q. What explanation did you find of it, do you remember?

A. No, I cannot recall it.

Q. Well, they seem to have——

A. They had a claim against the Columbus & Shelbyville Railroad Company.

Q. For freight and charges, or what?

A. That was for two bonds taken at eighty cents.

1860 Q. Sixteen hundred dollars.

A. Sixteen hundred dollars; and then there was interest on that, $630.

Q. And those bonds were acquired in 1856?

A. Those bonds were acquired in 1856.

Q. Then in 1862 they sold——

A. They took Indianapolis & Madison preferred stock, twenty-six shares at fifty dollars, and some script. $915 is charged to profit and loss.

Q. The bonds were exchanged then to preferred stock.

A. Yes sir.

Q. At a loss of $915?

A. Yes sir.

Q. In August, 1862?

A. Yes sir.

Q. Then that preferred stock, what became of it?

A. It was sold in 1864.

Q. In August, 1862, was it not?

A. No, it was sold, I think, the fifteen dollars of script for four dollars and a half, and they sold the stock for thirteen hundred dollars.

Q. It was disposed of in the same month, August, 1862?

A. No, in 1864.

Q. Is it 1864?

A. Yes sir. Journal C——

Q. Then your exhibit is wrong.

A. No, it is right.

Q. Yes, I see, you have the year 1864 put in in ink. Exhibit 20 deals with the transactions of the company in its own stock? You have inserted in this exhibit copies of certain portions of the proceedings of the board of directors of the company, They are

1861 the same as the extracts you read, are they not, on your examination in chief?

A. You are taxing my memory now, too much.

Mr. KETCHAM: If the master please, I don't think the witness ought to be required to remember at this time what he read a week or two ago.

Mr. WILLIAMS: I don't require him to. If he cannot do it, all he has to do is to say so.

Mr. KETCHAM: I don't think he ought to be required to say so.

Mr. WILLIAMS: I do not insist upon the question. I thought perhaps he could remember it. That is all.

Mr. KETCHAM: My impression is, Mr. Williams, that there is more here than I had him read from the record.

Q. Have you examined the ledger balances for each year as they appear in the printed reports of the secretary to ascertain whether or not all of the securities mentioned in these several exhibits are reported by him as on hand?

A. I think so.

Q. Do you remember, did you examine those ledger balances critically?

A. Oh, yes sir, I examined them, but not with reference to that; I looked over his ledger balance, his balance sheets, and compared them with ours; but I could not say what they show now, without looking at them.

Q. Mr. Duy, turn to the annual report for the year 1862, please.

1862 A. Yes sir.

Q. Look at the secretary's statement No. 3, being his balance of ledger statement, on page 18 of that report, and tell me what securities he lists there?

A. Evansville & Crawfordsville Railroad stock, $24.429.89; Evansville & Crawfordsville Railroad Extension bonds, $94,950; Indianapolis & Madison Railroad preferred stock, $1,300; Cincinnati & Indiana Railroad bonds, $50,000; United States 5:20 bonds, $100,000.

Q. Mr. Duy, you have not got 1862.

A. Oh, I beg your pardon. I have 1862 now.

Q. Give them as it appears there.

A. Evansville & Crawfordsville Railroad stock, $24,429.89; Evansville & Crawfordsville Extension bonds, $94,950; Evansville & Crawfordsville account, $394.44; Indianapolis & Madison preferred stock, $1,300.

Q. Now down at the bottom.

A. St. Louis, Alton & Terre Haute Railroad second mortgage bonds $94,552.59; Indianapolis & Cincinnati Railroad loan, $50,000.

Q. Now turn to 1863.

Mr. KETCHAM: On that C. & I. $50,000, and U. S. 5:20 bonds, don't appear.

The WITNESS: No sir. Not in 1862. Now for 1863. Evansville & Crawfordsville Railroad stock $24,429.89; Evansville & Crawfordsville Railroad Extension bonds, $94,950; Indianapolis & Madison Railroad preferred stock, $1,300; Cincinnati & Indiana Railroad bonds, $50,000; United States 5:20 bonds $100,000; State of Indiana loan——

1863 Q. I do not care for those; I only had in mind the securities. Now, turn to the secretary's report for that year, ending November 30, 1863, and read me what you find at the bottom of page 7—not at the bottom; just a little ways from the top of the report.

A. (Reading:) "The following bonds of the St. Louis, Alton and Terre Haute Railroad Company, to-wit, second mortgage preferred $57,000.; ditto, income, $37,500.; ditto, script $52.59; total $94,552.59.;

have by the direction of the board been sold, and $100,000. in United States 5:20 bonds purchased."

Q. Now for the year 1864 what securities do you find listed in the balance of the ledger statement?

A. Evansville and Crawfordsville Railroad stock $24,429.89; Evansville and Crawfordsville Railroad Extension bonds, $94,950; Cincinnati and Indiana Railroad bonds $50,000; United States 5:20 bonds $100,000.

Q. What other securities do you find listed there?

A. United States certificates of indebtedness, $72,000; United States five per cent. Treasury notes $18,500; United States quartermaster's warrants $4,375.; the last three reported with the cash items in the treasurer's hands.

Q. Now what securities do you find listed in 1865 in the balance of ledger statement?

A. Evansville and Crawfordsville Railroad stock $24,429.89; Evansville and Crawfordsville Railroad Extension bonds $94,950.; Cincinnati and Indiana Railroad bonds $50,000; United States 5:20 bonds $100,000.

Q. Now in 1866 what do you find in the secretary's report of balance of ledger statement?

A. Evansville and Crawfordsville railroad stock $24,429.89;
1864 Evansville and Crawfordsville Railroad Extension bonds $94,950; Cincinnati and Indiana Railroad bonds $50,000; United States 5:20 bonds, $100,000.; Terre Haute and Indianapolis Railroad stock $50,000.; Union Star Line stock $5,000; Indianapolis City bonds $3,000.

Q. Now in 1867 what do you find listed in that balance of ledger statement?

A. Evansville and Crawfordsville Railroad stock $4,534.48.; Evansville and Crawfordsvill Railroad Extension bonds $79,125.; Cincinnati and Indiana Railroad bonds $40,000.; Chauncey Rose, trustee, T. H. & I. R. R. stock, $515,400.; Union Star Line stock, $2,500.; Indianapolis City bonds $3,000.

Q. In 1868 what do you find listed in the balance of ledger statement?

A. Evansville and Crawfordsville Railroad stock $13.740.48.; Evansville and Crawfordsville Railroad Extension bonds $79,125.; Evansville City bonds $42,500; Cincinnati and Indiana Railroad bonds $16,740.; Chauncey Rose, trustee, T. H. & I. stock $522,900.; Union Star line——

Q. Won't you read all the entry there about Chauncey Rose, trustee?

A. Chauncey Rose, trustee, T. H. & I. stock, 6.972 shares at seventy-five dollars per share, $522,900.; Union Star Line stock $2,500.

Q. Did you get in the St. Louis, Vandalia and Terre Haute Railroad account?

A. That is an account, an open account.

Q. Read that.

A. St. Louis, Vandalia and Terre Haute Railroad account,—
1865 $191,258.47

Whereupon, the hour of 12:30 having arrived the further hearing was continued until two o'clock p. m.

1866 MONDAY, *October* 30, 1899—Two o'clock p. m.

The parties met pursuant to adjournment.
Present, the same as heretofore, with the exception of Judge Robert S. Taylor of counsel for plaintiff and Lawrence Maxwell, Esq., counsel for defendant.

The cross-examination of the witness, GEORGE C. DUY, was resumed as follows:

Questions by Mr. JOHN G. WILLIAMS:

Q. Please turn to the secretary's ledger balance for the year 1869, as it appears on page 13 of the annual report for that year, and give me the list of securities as they appear in that statement.
A. Evansville and Crawfordsville Railroad stock $13,740.48; Evansville and Crawfordsville Extension bonds $79,125; Evansville City bonds, $42,500; Chauncey Rose, trustee, T. H. & I. R. R. stock, 6,972 shares at $75 per share, $522,900.; St. Louis, Vandalia and Terre Haute account, $294,412; St. Louis, Vandalia and Terre Haute Railroad bonds $202,000; Union Star Line stock $2,500.

By Mr. KETCHAM:

Q. Are those footed in the report and simply carried into something else?
A. Carried into other things.

By Mr. WILLIAMS:

Q. You will notice, Mr. Duy, that an item of Cincinnati and Indiana Railroad bonds which appeared in the ledger bal-
1867 ance for 1868 does not appear in the ledger balance for 1869.
A. That is right.
Q. Exhibit No. 16 shows, does it not, that those bonds were sold in February 1869?
A. Closed out in February, 1869, the last of them.
Q. There were some sold in 1863, were there not?
A. They were bought in 1863.
Q. There was some sold in 1868?
A. Yes sir.
Q. And the balance were sold in February 1869?
A. Yes sir.
Q. Now, in that connection I wish to ask you about a matter that escaped me this morning. The item of 5:20 United States bonds, which appears in the ledger balance for the year ending November 30, 1866, does not appear in the ledger balance for the year ending November 30, 1867?

A. No sir.

Q. Do you remember what became of those bonds?

A. They were sold in New York by Mr. McKeen in 1867.

Q. And the proceeds of them were used in the purchase of T. H. & I. stock in New York?

A. Yes sir.

Q. In the exhibits we were considering this morning, numbered from 14 to 20, both inclusive, there was no mention made of the Evansville City bonds that the company purchased?

A. No sir.

Q. But, I find a reference to those bonds on page 3 of Exhibit 53. You there state that fifty of the Evansville City bonds, $1,000 each, were bought at eighty-five cents for the purpose of aiding the Evansville, Henderson and Nashville Railroad Company in the purchase of iron rails.

1868

A. What page?

Q. Page 3 of Exhibit 53; and you refer to Minute Book 2, page 109. I really do not remember whether you read that on your examination in chief or not.

Mr. KETCHAM: He did not.

Q. I would like you to let me see what that is.

A. Minute Book 2, page 109. Shall I read it?

Q. Yes sir.

A. (Reading:) "St. Nicholas hotel, New York, June 19, 1868. W. R. McKeen, Esq., president, T. H. & I. R. R. Co. Dear Sir. Before this reaches you, you will probably have received from Mayor Walker the $50,000 Evansville City bonds, which by agreement with you and Mr. Rose, your R. R. Co. was to take at eighty-five cents, and for which it was to furnish the Evansville, Henderson and Nashville Railroad Company $42,500 to purchase rails for the northern forty miles of that road. This agreement connected with a stipulation by me for the bonds that your company should be saved harmless from any loss on the bonds. (Which stipulation is between us concerned.) I have heretofore written you three letters on this subject, to which I have received no answer. I shall be glad to receive the cash direct here at the Farmers' Loan and Trust, with as little delay as practicable, as if Mr. Rawlston succeeds in disposing of the residue of the bonds, which he has just received and which he believes he can place at eighty-five cents, I shall need the whole proceeds at once to complete purchase of rails. The same amount with yours for the bonds taken and cancelled by the city of Evansville, in connection with the arrangement made with you is already placed at my disposal by the city. John H. Barrett of Henderson, Kentucky, and myself, as Mr. Rose is already aware, are authorized to take these bonds and buy rails, chairs, spikes, &c. Very truly yours. John Ingall, president, by Barrett and Ingall. The president reported verbally progress of surveys for lateral branches" &c.

1869

Q. The action of the board probably precedes that letter, don't

it, Mr. Duy? You will find that the president submitted the letter, perhaps.

A. Yes, on page 108 of the record it reads as follows: (Reading:) "The president read a letter from John Ingall, Jr., in relation to this company taking fifty thousand dollars City of Evansville seven per cent. bonds to aid the construction of the Evansville, Henderson and Nashville railroad for the purchase of iron; said bonds to be taken at eighty-five cents on the dollar. It was ordered that fifty thousand dollars of said bonds be taken by this company, and the letter put of record and filed. Mr. Ingall's letter is as follows."

Q. Please turn to ledger balance as given by the secretary on page 10 of the annual report for the year ending November 30, 1870, and give me the items of securities appearing in that balance.

A. Evansville and Crawfordsville Railroad stock, $13,740.48; Evansville and Crawfordsville Railroad Extension bonds,
1870 $79,125; Evansville, Terre Haute & Chicago Railway account —you don't want that?

Q. Yes, I would like you to put that in.

A. $17,977.44; Evansville City bonds, $42,500.; Chauncey Rose, trustee, T. H. & I. R. R. stock, 6,792 shares, at $75. per share, $522,900.; St. Louis, Vandalia & Terre Haute Railroad bonds, $460,400.; St. Louis, Vandalia & Terre Haute Railroad stock, $265,000.; St. Louis, Vandalia & Terre Haute Railroad account, $55,000.; Union Star Line stock, $2,500.

Q. The additional items that appear in that ledger balance as compared to the ledger balance for 1869, are the Evansville, Chicago & Terre Haute Railway and the St. Louis, Vandalia & Terre Haute Railroad stock, are they not?

A. Yes sir; and a change in the Vandalia bonds.

Q. In the amount?

A. Yes sir.

Mr. KETCHAM: What is the $55,000.?

Mr. WILLIAMS: That is St. Louis, Vandalia & Terre Haute Railroad account, which is reduced from $294,412.66 to $55,000., and the bond account increased.

Q. Please turn to the ledger balance, as it appears on page 11 of the annual report for the year ending November 30, 1871, and give me the items of securities as they appear in that balance.

A. Evansville & Crawfordsville Railroad stock, $13,740.48; Evansville & Crawfordsville Railroad Extension bonds,
1871 $79,125.; Evansville, Terre Haute & Chicago Railway account, $30,982.16; Evansville City bonds, $42,500; Chauncey Rose, trustee, T. H. & I. R. R. stock, 6,972 shares, at seventy-five dollars per share, $522,900.; St. Louis, Vandalia & Terre Haute Railroad bonds, $328,500.; St. Louis, Vandalia & Terre Haute Railroad stock, $265,000.; Union Star Line stock, $2,500.

Q. In 1872 the whole plan of printing the ledger balances was dropped, was it not, Mr. Duy? Look on page 10 of the annual re-

port for the year ending November 30, 1872, and see what you find there?

A. I find a balance sheet.

Q. It is headed, "balance sheet," is it not?

A. Yes sir.

Q. But in practical effect it is the old ledger balances. Please give me the items of securities as they appear on that balance sheet?

A. St. L. V. & T. H. R R. Company's stock, $265,000; Evansville & Crawfordsville R. R. Company's stock, $42,404.48; Evansville, Terre Haute & Chicago R. R. Company's stock, $50,000; Terre Haute & Indianapolis R. R. stock, Chauncey Rose, trustee, $522,900; St. Louis, Vandalia & Terre Haute Railroad bonds, $364,500; Evansville & Crawfordsville Railroad Extension bonds, $79,125; Evansville City bonds, $42,500; St. Louis, Vandalia & Terre Haute R. R. Company construction account, $188,941.55

Q. Whose name is signed as secretary for that year?

A. W. H. Buckingham.

Q. The report in 1871 is signed by whom as secretary?

A. R. A. Morris.

Q. Mr. Morris was secretary from 1866 until 1872, was he not?

1872 A. I believe so.

Q. As shown by the reports?

A. Yes sir, he was until 1872.

Q. In these exhibits, from 14 to 20, both inclusive, which we had this morning, no mention is made of this Vandalia, Terre Haute & Chicago Railroad Company's stock?

A. No sir.

Q. But it appears on page 3 of Exhibit 53, as I see here, in connection with it a notation "See Journal E, page 184." Will you please let us have that journal entry?

A. Journal E, page 184. Terre Haute, August 13, 1872. Evansville, Terre Haute & Chicago Railroad Company's stock, to Evansville, Terre Haute & Chicago Railroad Company current account, for certificate No. 117, dated June 5, 1872, for 1000 shares of capital stock of said company, at $50 per share, $50,000.

Q. Is that all the explanation it furnishes?

A. Yes sir, there is a reference to ledger, page 508. (Referring) Ledger D, page 508. discloses that the account of the Evansville, Terre Haute & Chicago Railroad Company, the debit side of which consists of various charges for work, mileage, and cash, and motive power, and so forth, amounting to $50,274.72; and there are credits amounting to $136.13, and that leaves $51,128.49; and then there is a credit of $50,000. for this stock, and there is a balance of $138.49, which is carried to a new account; so that the bonds were taken in payment for an account.

Q. The stock?

A. The stock was taken in payment for an account that the Chicago road owed.

1873 Q. In one or more of the ledger balances we have been looking at today there was a reference to a State of Indiana loan.

A. Yes sir.

Q. Is that the amount that appears on page 3 of your Exhibit 53?

A. Yes sir.

Q. You have a notation there, "See Journal C, page 89."

A. Yes.

Q. Is that anything more than the original of which you give a copy?

A. I don't know whether this is a copy, or not. This is the substance of it, at all events. It was a loan of cash to the State officers for the purpose of carrying on the State business.

Q. Get the entry, please.

A. Journal C, page 89, October 30, 1863. State of Indiana loan to treasurer for this amount of money loaned to the State, for the support of benevolent institutions, and the payment of expenses connected with the administration of the government of the State; interest to be paid from date, and is to be refunded as soon as provision is made therefor. See acknowledgement on *on* file, $15,000.

Q. And you note on Exhibit 53 that it was repaid March 2, 1865. Is that right?

A. Yes sir, that is right. There is another little item I think perhaps you want.

Q. What is that?

A. Indianapolis City bonds.

Q. Yes, tell me about them, if you can.

1874 A. Journal C, page 579, November 30, 1866, Indianapolis City bonds, to bills payable, for city warrants, No. 427 to 454 inclusive, and Nos. 505 and 506, total number of bonds, thirty, of a hundred dollars each, issued October 1st, 1866, due April 1st, 1868, interest payable 1st of April and October, each year; the above received for a like amount of city orders, $3,000.

Q. Do you know what the city orders were for?

A. No sir; they were received in the course of business, as cash.

Q. Exhibit 47 is designated "itemized surplus account to November 30, 1872." It purports to have for its first entry, March 18, 1853?

A. Yes sir.

Q. Does this exhibit contain a full and correct statement of the surplus account for each year from the time that account was opened until November 30, 1872?

A. It was intended so to do, and I think it does.

Q. It shows the amount of surplus at the close of each year, does it not?

A. Yes sir.

Q. And do the surplus balances, as shown by this exhibit, agree with the surplus balances as they appear in the secretary's annual reports?

A. I do not think they do in every instance. Right on the bottom of page 1 there appears a note to the contrary.

Q. A very immaterial thing that was absorbed in the next year, was it not?

A. I suppose so, yes sir.

Q. Just explain to the—us what that was?

1875 A. Well, this disagreement was that this balance agrees with the secretary's ledger, but in making up his published statement for the year 1853 he reduces the above balance, surplus account, $28,705.03, by crediting to dividend account the sum of $29,546, which stands to the credit of dividend account in his published statement. That is to say he credited surplus, with the credit to dividend in his account, and calls this surplus.

Q. Well, really the surplus was what?

A. As shown here, $58,251.03

Q. Was that the surplus after paying the dividend?

A. After he charged it off on his ledger, as he did in his statement, then the surplus would be $28,705.03; but that dividend was charged off on books in January, 1854. It comes to the same thing.

Q. You come around to the same thing in the end?

A. Oh yes, the same thing.

Q. Now, do you recall any other discrepancies?

A. No sir, I do not recall any, nor do I see any memorandum of any differences; and referring to the printed report of 1872 I find the amount of surplus stated there agrees with the amount in our statement.

Q. Do you recall ever having checked these annual statements with the annual statements of the secretary?

A. Well, I think I have, most of them, yes sir; the balance sheets I know I did, because I made balance sheets of my own.

Q. And the only discrepancy is that immaterial one which you noted, occurring in 1853?

A. That is the only thing that I see. If there was any dif-

1876 ference in any one year it has been straightened out by some subsequent entry on the books.

Q. Now, turn to the annual report for 1866, please, and tell me what you find on page 12 of that report, to be stated as surplus account?

A. $828,845.70

Q. That agrees, does it not, with your itemized surplus statement, Exhibit No. 47?

A. Yes sir.

Q. By what was that surplus represented that year, at the close of that year—I mean in the main, of course, not the smaller items.

A. That includes the balance carried down from the former year.

Q. Well, I do not mean that. I wanted you to tell me from the ledger balance that year, what represented that surplus, what the company had that surplus in?

A. That was in 1866.

Q. Yes sir, page 12 of the report for that year, the same page from which you gave me the surplus.

A. Well, there is, $484,258.39 in cash.

Q. In the hands of the treasurer; more than half of the total surplus, then, was in the hands of the treasurer as cash, was it not?

A. Yes sir.

Q. Now, what do you find representing in the main, the other half?

A. Well, $15,000. due from agents, and about $116,000. in materials; $9,777. of bills receivable, and $11,558. due for United States mail; and the rest of it must have been invested in some of these securities. I am taking, now, out of the list of assets the immediately available items.

1877 Q. Of course, as against those minor items which you have quoted, there are quite a number of items on the debit side that would reduce them some?

A. About thirty or thirty-five thousand dollars.

Q. Sir?

A. There is about forty thousand dollars.

Q. Well, take the securities that the company held then at the close of that year, and give me the total amount of them, please. Call them as you put them down.

A. $24,429.89, Evansville & Crawfordsville Railroad stock; now Evansville & Crawfordsville Extension bonds, $94,950.; Cincinnati & Indiana Railroad bonds, $50,000; United States 5:20 bonds, $100,000; T. H. & I. stock, $50,000; Union Star Line Company, $5,000; Indianapolis City bonds, $3,000.

Q. Now what do all those make?

A. 327,379.89

Q. That too, lacks but little of representing the other half of surplus?

A. Yes sir.

Q. The other half of the surplus would be $412,000. in round numbers, or $414,000; in round numbers. Now, at the close of 1867 what does the secretary report as the surplus?

A. $957,278.37

Q. No, Mr. Duy, no, no; at the close of 1867.

A. Oh, I got 1868. Eight hundred and twenty-eight thousand——

Q. No, you have got 1866. Now, 1867 is between those two; maybe you haven't got it in that book.

A. I think I have found it. $800,925.37

1878 Q. That shows a surplus of some $28,000. less than the year before?

A. Yes sir.

Q. That reduction in surplus was, in the main, accounted for, if not altogether accounted for, by the re-valuation of the securities, was it not?

A. More, I should say, a good deal more, if that is the year it was done. There was two hundred thousand dollars charged off in one item.

Q. Look at your surplus account a minute; look on page 6 of Exhibit 47.

A. Yes sir, there was.

Q. Surplus account was credited that year, was it not, with $59,026.29 from interest and rents, and with $485,550.75, transportation, balance transferred?

A. Yes sir.

Q. And then was debited with various items of expenditure including dividends, and with a debit from profit and loss account, of $203,308.34?

A. Yes sir.

Q. And that debit from profit and loss account, represented the re-valuation of the securities, that was made that year?

A. Yes sir; but for the large transportation receipts the surplus would have been reduced more than it was; it was really reduced by that one entry two hundred and three thousand dollars.

Q. Yes, it would have been hard to have accumulated a surplus but for the transportation receipts.

A. What I meant to say was that the balance would have been much more largely reduced. The surplus was really reduced $203,000 by that one entry.

1879 Q. Now, what represented that surplus at the end of that year?

A. Well, there was $307,237.55 in cash.

Q. The treasury had run down since the year before?

A. And there was $515,400. in T. H. & I. stock.

Q. Those two items alone more than represent the total surplus?

A. Yes sir, more than represent the surplus; but there has been, there was about $170,000. of dividends to the credit of dividend account, which would have to come out of that cash.

Q. Yes, that is right.

A. So that it would require all of the securities and all the cash, about, to make up the surplus.

Q. Now, at the close of 1868, what was the surplus, as shown by the secretary's statement?

A. $957,278.37

Q. Does that agree with your itemized surplus statement?

A. Yes sir.

Q. Now, what in the main, represented that surplus that year?

A. Well, he had $194,865. in cash, and there were about $148,000. of cash liabilities; that left $46,865. available cash; and then he had his $522,900. of the company's stock, and $150,000. of other securities, and $191,000. of Vandalia account. That is more than enough—that is about enough to make it up.

Q. $191,258.47 of the surplus was represented by the St. Louis Vandalia & Terre Haute Railroad account.

A. I think so; yes sir; it would have to be.

1880 Q. There was over seven hundred thousand dollars represented by the T. H. & I. stock that the company owned, and by the St. Louis, Vandalia and Terre Haute Railroad account?

A. Yes sir.
Q. Now, in 1869, what did the secretary report as the surplus account?
A. $1,049,365.03
Q. Does that agree with your itemized surplus account as it appears on Exhibit 47?
A. Yes sir.
Q. Now, what represented that?
A. What year is this we are on? 1869?
Q. Yes sir.
A. That is right.
Q. Take the two items of the company's own stock, that it owned this year?
A. $522,900.
Q. And then take the two items of St. Louis, Vandalia & Terre Haute Railroad account, and the St. Louis & Vandalia Railroad bonds?
A. $294,412. and $202,000. Those items make $1,030,000.
Q. Those two items only fall about twenty thousand dollars short of representing the whole surplus?
A. Yes sir, thirty thousand.
Q. Yes sir, counting the surplus at $1,050,000. Don't you find, in addition thereto, in addition to those items, carried as an asset, the cost up to that time, of constructing the extension to the State line?
A. Yes sir.
Q. How much was that?
A. $207.406.86
Q. Don't you find another item there for double track?
A. Yes sir, $17,884.41
1881 Q. Now, taking those two items in connection with the other three that you mentioned, it would largely exceed the surplus, would it not?
A. O, yes sir.
Q. At the close of the year 1870 what is the surplus as stated by the secretary?
A. $1,095,523.36 I think it is.
Q. Does that agree with Exhibit No. 47?
A. Yes sir.
Q. Now, tell us what represented that surplus that year. What is invested in the extension to the Illinois State line?
A. $447,706.43
Q. $447,766.43, is it not?
A. Yes sir. $447,766.43
Q. What in double track?
A. $25,075.35
Q. What in South Branch road?
A. $51,651.33
Q. What in equipment?
A. $138,139.83

Q. What is the aggregate of those items?
A. $662,632.94
Q. More than half of the surplus, is it not?
A. Yes sir.
Q. Now, what other items do you find there accounting for that surplus?
A. The company's stock, $522,900.
Q. Then take the Vandalia investments.
A. It is more than enough now.
Q. I know, but just take them.
A. Vandalia $460,400, and $265,000 and $55,000.
1882 Q. What do they make, those four items?
A. $1,303,300.
Q. Just those four items?
A. Yes sir.
Q. And what is the total of those four items, and the first four you gave up there, of $662,000 and odd dollars?
A. $1,965.933
Q. That is nine hundred thousand dollars and over in excess of the surplus?
A. Yes sir, it stands for the surplus and the eight hundred thousand dollars of bonds.
Q. Yes, that is what I was going to ask you about. They issued eight hundred thousand dollars of bonds that year, that is, the bonds amounted to eight hundred thousand dollars that year?
A. Yes sir.
Q. And they appear on the liability side of the ledger balance that year, don't they?
A. Yes sir, that is right.
Q. Take the first four items aggregating $662,632.94, representing the extension to the Illinois State line, double track, south branch road, and equipment, and add that amount to the amounts invested in St. Louis, Vandalia and Terre Haute Railroad bonds, stock and accounts, and give me the result.
A. $1,443.032.94
Q. That is more than three hundred thousand dollars in excess of the surplus, is it not?
A. Yes sir. Yes, it is $348,000 in excess of the surplus.
Q. Now, what does the secretary give in his printed statement as the surplus for the year ending November 30, 1871?
1883 A. $1,135,908.99
Q. Does that agree with the surplus as you state it in Exhibit No. 47?
A. Yes sir.
Q. What does he give as the amount invested in the extension to the Illinois State line that year?
A. $449,860.71
Q. What in double track?
A. $25,075.35
Q. What in equipment?

A. $138,139.83

Q. Giving a total of what?

A. $613,075.89

Q. And what is the total amount invested in St. Louis, Vandalia & Terre Haute railroad bonds and stock?

A. $593,500.

Q. If that be added to the total of the other three items I just gave to you what will it make.

A. $1,206,575.89

Q. More than a hundred thousand dollars in excess of the surplus?

A. No, about seventy thousand dollars more, in round numbers.

Q. The surplus is eleven hundred and thirty-five thousand dollars, in round numbers?

A. Yes sir.

Q. And what did you give me as the total of those items?

A. Twelve hundred and six thousand.

Q. Oh, I beg your pardon. I thought you said two hundred and sixty thousand. Now, for the year ending November 30, 1872, what does the secretary give as the surplus for that year?

1884 A. $1,186,143.12

Q. Does that agree with the surplus, as stated in Exhibit No. 47?

A. Yes sir.

Q. What do you find in the balance sheet of the secretary for that year, to represent that surplus; or, first, I will ask you, do you find anything in there representing extension to State line, double track and equipment?

A. Not so designated.

Q. Well, into what has it been thrown?

A. It has been thrown into a statement of cost of road and equipment and construction, of 1872.

Q. What do those two items make?

A. Those two items amount to $2,807,313.19

Q. How does that compare with the aggregate——

A. Wait a moment, please. That includes $1,988,150., which has heretofore been charged to construction account, and the difference is $819,163.19, which would represent the cost of extension and double track and equipment.

Q. Does that agree with your figures?

Mr. KETCHAM: Are the branches included in that?

The WITNESS: No.

A. I will see whether it agrees with my statement, or not. (After referring.) That is right.

Q. It agrees with your statement, does it?

A. Yes sir, that is what I have made it up. That covers everything that is charged to cost of road, except the original construction account, $1,988,000.

1885 Q. Where do you find that?

A. I find that on page 5 of Exhibit 55.

Q. Exhibit 55, or your statement 55?

A. Exhibit 55, statement 59.

Q. What page of Exhibit 55?

A. Page 5. You see the aggregate there, $2,807,313.19

Q. That is right.

A. That is the same as reported here. You see that covers double track, equipment, T. H. & I. extension and that $207,000. brought in from surplus.

Q. Please read the items that go to make up that $2,807,313.19 as they appear on page 5 of Exhibit 55?

A. Construction balance of account transferred. $1,988,150.; double track construction, $25,075.35; equipment, $138,139.83; T. H. & I. Extension construction, $448,860.71 amount transferred, the same being expenditures incurred by additions, betterments to the road, and equipment, during the year ending November 30, 1872, $207,087.30; total $2,807,313.19

Q. Now, will you please give, as shown by that exhibit the items composing that amount, which was transferred, as representing expenditures, occurring for additions and betterments to road, and equipment, during the year ending November 30, 1872?

A. The expenditure for additions and betterments to road and equipment is made up of the following items, to-wit: For bridge superstructure, $2.201.56; ballast, $942.05; freight cars, $82,476.35; cross ties, $4.541.89; engine houses, $7,768.87; grading, $15,234.51 iron rails, $36,701.77; machinery for shop, $15.239.78; locomotives, $23,171.63; machine shops, $10,043.38; real estate, $4,490.50; station houses, $4,275.01; total $207,087.30

1886 Q. Please make that read total for the year 1872.

A. Yes sir. Now, that $819,000., a little more than covers the liability on the bonds.

Q. Which $819,000?

A. Why, invested in that.

Q. Oh, yes, you mean the difference between construction as it stood before the extension account was carried into it?

A. Yes sir, there is that much invested in that, and then we have got to make the surplus. $522,900—do you want that?

Q. Yes sir.

A. $522.900 of our own stock; $364,500 of Vandalia bonds; $79,125 of Evansville & Crawfordsville bonds; $42,500 City of Indianapolis bonds, and $188,941.55 of Vandalia construction account; $42,404.48——

Q. Evansville & Crawfordsville account?

A. Construction account, $188,941.55, should be stricken out; it is not on these books.

Q. All right, go on with the balance, then.

A. That makes $1,151,000.

Q. But you have not included in that St. Louis, Vandalia & Terre Haute Railroad Company's stock, $155,000. which does appear on the books, don't it?

A. Yes sir, I see that. I am getting too much, entirely. I got nearly enough in those other items.

Q. Yes, I understand.

A. The St. Louis, Vandalia & Terre Haute is $265,000.

Q. And what did the treasurer have in his hands?

A. He had $64,000., but he owed twice that.

Q. I just wanted to call attention to his unhappy condition,
1887 as compared with a few years before, when he had four hundred thousand dollars in his hands.

A. He had $65,000., but there was cash liabilities to double the amount. That is what these books show. $64,000. His report shows he had twice that amount of money.

Q. Sir?

A. The books show he had nearly twice that, I think. How is that?

Q. You explained that the other day, didn't you?

A. Yes sir, I stated the fact. I don't know how it came.

Q. There were certain debit and credit items that appeared in this balance sheet that don't appear upon the books of the Terre Haute & Indianapolis Railroad Company which you examined.

A. Yes.

Q. But which you assumed appeared upon other sets of books belonging to the St. Louis, Vandalia & Terre Haute business?

A. I conjectured so.

Q. That was your conjecture, and those items, so far balanced each other, that the surplus is shown, and the stock——

A. Stock and surplus are correct.

Q. The stock and the surplus were the same as they are in this balance sheet?

A. Yes sir.

Q. In your examination in chief, you stated that you had found nothing in the books indicating any action on the part of the board of directors, setting aside the surplus or any part of it, as a reserve for future contingencies?

A. Yes sir.

1888 Q. I will ask you if you don't find in the annual reports of the board of directors to the stockholders, from time to time, reference to the surplus, and the use to which it has been or would be put?

A. I think so; I cannot locate any.

Q. Well, please turn to the annual report for the year ending December 31st, 1853, on page five.

A. I will have to get back of this book.

Q. Yes sir, back of that one, but you have one there that does have it. You have got the only complete set that we have—these others are a little bit short—and read me what you find there, beginning at the last paragraph on page four.

A. (Reading:) "A detailed account of receipts and expenditures will be more fully shown by the secretary's report, hereunto annexed—it will be seen that the expense of operating the road and

repairs amounts to thirty-eight per cent. on the gross receipts. We have within the last year purchased two first class engines, constructed sixteen cars, purchased wheels and axles, and iron trucks for seventy more, all of which will be needed during the present season, we have added considerable machinery to our shops, built an addition to our depot in Terre Haute, including good and convenient offices for all the officers of the company, have also constructed six good substantial wood-houses, along the line of the road—to meet the payment of those and other expenditures, we used temporarily the surplus earnings of the road, increased the capital stock $106,262.90 including $34,500. of the 6 per cent. convertible bonds, which have been surrendered and converted,
1889 also, a part of outstanding certificates of interest on stock. To enable us to meet the anticipated increase of business before the close of the present year, we think it advisable to purchase three more engines and construct sixty or seventy cars, of different kinds, during the season,—the road is now about one-half fenced, and we hope to have the whole line finished in a few months."

Q. Now, whilst it is not particularly connected with the subject of surplus, it is with other matters to which I have referred in cross-examining you, I will have you read the annual report for the year 1854, beginning at the first paragraph on page four. It is dated 1855, but it is for the year ending December 31, 1854.

A. (Reading:) "In our last annual report, we anticipated that the extension of the Evansville and Crawfordsville railroad from Vincennes to this place, would have been completed in October last. We are now gratified to state, that by energetic and efficient management, the trains on that road commenced running in November last; already the advantages anticipated from the completion of this important connecting road are beginning to be realized. A train leaves Evansville and Terre Haute daily, placing us in connection with the Ohio river at the city of Evansville, a distance of one hundred and nine miles. The Ohio and Mississippi railroad from St. Louis, is rapidly approaching Vincennes, and will be completed to that place early the ensuing summer, thus placing us in connection with St. Louis, and reducing the distance by railway from New
1890 York to St. Louis, as stated in our last annual report, near a 'hundred miles less than the present route by Chicago.' The Ohio and Mississippi road, by its intersection with the Illinois Central, which road was opened from Chicago to Cairo on the eighth of the present month, places our road in connection with Cairo on the Mississippi river, at or below which point the navigation of the Mississippi river is never interrupted by ice or low water, and from whence arrangements have been made by the Illinois Central road for first class steamers to ply to New Orleans.

"The Terre Haute and Alton Railroad Company have completed their track to the neighborhood of Charleston, about fifty miles west of Terre Haute, and are rapidly extending it over the fertile prairies of Illinois. On this portion of that road, freight and passenger trains are daily running. When this connection is made by

the Terre Haute and Alton road, with the Chicago branch of the Illinois Central, a direct route from Terre Haute to Chicago, will be had. On the west end of the Terre Haute and Alton road upwards of fifty miles are completed, and trains running. The unfinished portion of that road is in a state of forwardness, and when completed, will make a railway route from Terre Haute to St. Louis via Alton. From the increase of business already thrown on our road by the completion of the Evansville and Crawfordsville road to this place, and the running of trains on the finished portion of the Terre Haute and Alton road, connecting with our road, we can hardly estimate the amount of increase in its travel and business when the Ohio and Mississippi, (from St. Louis to Vincennes) 1891 and the Terre Haute and Alton roads are completed, or the connection made with the Illinois Central, thus uniting by railway, St. Louis and Cairo on the lower Mississippi, Galena on the upper Mississippi, and Chicago on Lake Michigan."

Q. Now, please turn to the annual report for the year 1855, and read me what appears there, beginning with the third paragraph on page five, of that report.

A. (Reading:) "On the fourth day of July last, the Illinois division of the Ohio and Mississippi railroad was opened from St. Louis, Mo., to Vincennes, Ind., connecting at the latter place with the Evansville and Crawfordsville, and at Terre Haute with the Terre Haute and Richmond railroad. On the 16th of July, the three roads commenced running trains in close connection from St. Louis to Indianapolis. We are at the present time, running two express trains daily, in connection with the above-named roads, without change of cars or baggage at Terre Haute—forming by these the shortest and quickest route between the Atlantic cities and St. Louis. Our local travel is accommodated by a third train.

"In addition to the increased business thrown on our road by the connection stated, we are deriving an important amount of business from the Terre Haute and Alton railroad (which, in a few weeks more, will be opened through to Alton, giving us thereby another route to St. Louis,) and its connections with the Chicago branch of the Illinois Central, and the Great Western Railway of Illinois. By the Terre Haute and Richmond, Terre Haute and Alton, 1892 Illinois Central, and the Great Western railroads, a direct railway connection is made from Indianapolis, the capital of our State, to Springfield, the capital of the State of Illinois, and with the many lines of railways diverging from these two places.

"To meet the demands of increasing business, we will require four additional locomotives—two for passengers and two for freight; to keep the road bed and track in good order (the true economy of all railroads,) will require an increased expenditure in renewing cross-ties, culverts, &c.; all of which will be requisite to keep our stock and track up to a safe and efficient standard. These can be made without increasing our construction account or resorting to a loan; the surplus fund and prospective increase of business will, we anticipate, be ample to meet these demands."

Mr. WILLIAMS: Now, the annual report for 1856, if the master pleases, appears as an entirety, already in evidence, as Exhibit No. 49.

The MASTER: I remember.

Mr. WILLIAMS: That portion of the annual report for 1857, which has any bearing upon the points now being considered, was, at my request, read by Mr. Duy some days ago, in connection with the explanation I asked for as to the character and expense incurred in re-building bridges. That was read by him at that time.

The same may be said of the reports for 1858 and 1859, from which extracts were read by Mr. Duy, at my request, some days since.

1893 Mr. Ketcham, do you remember if in your examination-in-chief you introduced that portion of the annual report for the year ending November 30th, 1860, which dealt with the purchase of these Evansville and Crawfordsville Extension bonds?

Mr. KETCHAM: I don't think we did; I think not.

Q. In order that there may be no mistake, I will ask you, Mr. Duy, to turn to the annual report for the year ending November 30, 1860, and read what appears there, beginning at the last paragraph on page seven.

A. (Reading:) "At a meeting of the board of directors, held May 9th, 1860, the following order was passed:

"'In consideration of the increase of business that would be given to the Terre Haute & Richmond railroad by the connection of the Evansville & Crawfordsville railroad from Terre Haute to Rockville, in Parke county, it is ordered, that when the board of directors of the Evansville & Crawfordsville Railroad Company have a sufficient amount of stock subscribed, or other provisions made, to complete the bridging and grading to Rockville, that this company will furnish the iron for the track of said extension, provided the cost of the iron does not exceed the sum of one hundred thousand dollars / $100,000. / delivered at Terre Haute, and provided further, that the said Evansville & Crawfordsville railroad pledge that company to appropriate the income, above the necessary operating expenses of the extension of said Evansville & Crawfordsville railroad, from Terre Haute to Rockville, to the payment of the inter-

1894 est on the bonds, (one hundred and fifty thousand, $150,000.) being less than six thousand (6,000.) per mile, which the Evansville & Crawfordsville Railroad Company propose to issue for the construction of said extension.'

"An agreement was made with the Evansville & Crawfordsville Railroad Company as required by this order, and in compliance therewith, there has been furnished to the Evansville & Crawfordsville Railroad Company, the sum of ninety-four thousand five hundred and forty 13–100 dollars ($94,540.13,) and we have received from the Evansville & Crawfordsville Railroad Company one hundred thousand dollars of their seven per cent. bonds, interest payable semi-annually, and the payment of the bonds, secured by mortgage

on that part of said Evansville and Crawfordsville railroad extension, from Terre Haute to Rockville, and including all fixtures, franchises and property attached to that part of said road.

"The bonds were taken as directed by the board at ninety (90) cents on the dollar.

"The laying of the track of the extension of the Evansville & Crawfordsville railroad to Rockville has been completed and trains are running now on said extension, and it will doubtless prove a valuable tributary to the business of this company."

Q. Please turn to the report for the year ending November 30th, 1864, and read the last paragraph at the bottom of page six.

Mr. KETCHAM: You pass from 1860 to 1864, do you?

Mr. WILLIAMS: Yes sir.

1895 A. (Reading:) "The amount to the credit of surplus is not all available, a portion of it consisting in stocks and bonds of other roads, the construction of which added materially to the business of this road, and in real estate purchased for the benefit of the road, in procuring fuel, timber, etc., and in additional grounds required at freight stations; also, materials on hand.

"The board of directors, at its meeting held this day, December 24th, has made a dividend of five (5) per cent., also an extra dividend of five (5) per cent., out of the surplus fund, reserving the remainder of that fund, with a view to the construction in part, or in whole, of a double track."

Q. Now, turn to the report for the year ending November 30, 1865, and read what appears there, beginning at the top of page six, the first paragraph on that page.

A. (Reading:) "The successful business of the road has enabled the board to make a fair dividend on the capital, leaving a balance to the credit of surplus. This surplus is the property of the stockholders and in part available for any improvements or extensions that may be necessary. Part of this fund may be required to extend the road to the Illinois State line, as the charter of the road provides; this extension has not heretofore been required, but the building of a road, which we understand is in contemplation, from St. Louis, by the way of Highland, to the Illinois State line near the town of Darwin, will make it expedient to extend our road, from its present terminus at Terre Haute, to connect with the contemplated road, as it would give a shorter and more favorable route to St. Louis.

1896 Q. Please turn to the annual report for the year ending November 30, 1867, and read the portion of the paragraph appearing at the top of page six of that report.

A. (Reading:) "We are impressed that a large expenditure will be required the present year in extensions and double track. It is essential that part of the road should be laid with double track as soon as possible, and continued as fast as practicable its entire length; and it is also desirable, and we think to the interests of the stockholders, that brance roads should be extended in Clay county,

north and south from this road into the coal fields that they may be developed and increase the traffic over the main line."

Mr. WILLIAMS: If the master pleases, I believe that closes this long and tedious cross-examination, for your patience during which, and the patience of the witness and the counsel, I am very much indebted.

Re-examination.

Questions by WILLIAM A. KETCHAM, Esq.:

Q. Mr. Duy, in brief, what is the surplus account?

A. It is undivided earnings, in this case.

Q. Is that sufficiently comprehensive to give a clear understanding of what, as applied to these accounts, we have been considering, the surplus represents?

A. Well it would represent in these accounts, the assets of the company, less the liabilities.

Q. The surplus for any given period, on any of these re-
1897 ports, is the bookkeeper's excess of the assets over the outstanding liabilities of the road?

A. Yes sir, as shown by the face of the book.

Q. As shown by the face of the books? And the liabilities of the road, as represented by its capital stock or bonds, or other evidence of indebtedness, whether primary or secondary, or fixed amounts?

A. Except, possibly, in the case of an open account, which might be subject to question and variation.

Q. And controversy; but, as a rule, the liabilities are fixed and definite in amount?

A. Yes sir.

Q. Assets, on the other hand, are those amounts, as they appear on the books, that will depend, as to their value on what the asset consists of; they may be, in fact, correctly represented, and they may be, while correctly represented as a bookkeeping item, ultimately incorrectly represented?

A. Yes sir.

Q. And if incorrectly represented to that extent the surplus would be diminished, whether——

A. Or increased.

Q. Now, I will ask you to go a little further back. I understand that as to surplus during that period, the exhibit that you prepared agrees with the reports of the secretary. Am I correct in that?

A. Yes sir, I think so. We can refer to any year and get it exactly.

Q. You may take, then, this book, taking the surplus account a little further back than was asked you by Mr. Williams, I will get you to state what, with the surplus of the preceding year, constituted the surplus account, in the year 1863, before the charging
1898 up of any liabilities or expenses that year, that were charged to profit and loss account, amounted to?

A. What year do you want now?

Q. 1863. That was the year immediately preceding the 25 % issue of stock, in the dividend.

A. I don't understand the question.

Q. Examine, now, your Exhibit 47, page 3, what was the credit side of the surplus account, at the close of the year 1863?

A. $892,981.09

Q. That included the surplus for the preceding year, of how much?

A. $468,780.83

Q. So that the gross surplus during the year 1863, was the difference between the $468,780.83 and the $892,981.09?

A. Yes sir.

Q. Now, I will call your attention to some item of expenditure in that surplus, during that year. Do you find any item on account of new locomotives?

A. Yes sir.

Q. Set it down.

A. Yes sir.

Q. What is the amount?

A. $37,343.50

Q. New freight cars purchased; do you find any such item as that?

A. Yes sir; $42,705.02

Q. What is the aggregate of those two amounts?

A. $80,048.52

Q. If therefore there had been no expenditure during the year 1863 for new locomotives and new freight cars purchased
1899 what would have been, at the close of the year, the actual surplus—at the end of the year 1863?

A. $661,107.30

Q. Now, in the surplus account, the gross surplus account for the year 1864, the net surplus account for the previous year, $581,058.78 is included, is it not?

A. Yes sir.

Q. Making the aggregate of $1,161,686.86

A. Yes sir.

Q. Now if these items that I have given you, of new locomotives and new freight cars, had not been purchased in 1863 the gross surplus at the end of 1864 would have amounted to what?

A. $1,241,735.85

A. Now, during the year 1864 there was quite a large amount expended for new locomotives, new passenger cars, new baggage cars, rebuilding bridges, new bridges and such items as that, were there not?

A. Yes sir.

Q. What was the amount—and I wish you would set these items down—of new locomotives; expended for new locomotives?

A. $102,741.90

Q. Now passenger cars?

A. $10,930.33
Q. New baggage cars and freight cars?
A. $34,979.58
Q. Rebuilding bridges?
A. $6,742.80
Q. New buildings?
A. $4,863.38

Q. What is the aggregate of those items including the
1900 items of a similar character in the year 1863?
A. $240,306.51

Mr. WILLIAMS: You included the State and county taxes and interest and exchange.

Mr. KETCHAM: I did not intend to.

Mr. WILLIAMS: It was included in that aggregate of a hundred and sixty-eight thousand.

Mr. KETCHAM: I am not asking him about the aggregate of a hundred and sixty-eight thousand but a hundred and forty-eight thousand.

The WITNESS: The aggregate of 1864 is $160,257.99

Q. And of the two?
A. The aggregate of the two is $240,306.51
Q. Now, upon the secretary's statement and upon our Exhibit No. 47, the surplus account at the end of the year, including these charges to which I have called your attention in detail, amounted to $634,791.88, did it not?
A. Yes sir.
Q. Assuming that those expenditures had not been made, and therefore that those charges had not been made to surplus, what at the end of 1864 would have been the surplus as shown by the books?
A. $875,098.39
Q. What was the gross amount of the surplus at the end of the year 1855 before making deductions on account of expenditures during that year?
A. As stated by the secretary?
Q. As stated by the secretary, and as stated by your report, by Exhibit No. 53?

1901 A. One million, two hundred and forty-nine thousand, two hundred and ninety-two dollars and fifty-eight cents. ($1,249,292.58)

Q. During that year what amount was expended for new buildings?
A. $13,383.14
Q. What for rebuilding bridges?
A. $36,003.01
Q. New locomotives?
A. $43,455
Q. New passenger cars?
A. $20,352

Q. New freight cars?

A. $97,424.54

Q. What is the aggregate of those sums together with those similar amounts during the preceding years as you have given them to me from 1863 forward?

A. $450,927.20

Q. Now taking the net surplus at the end of 1865, $749,277.63 but for charges against surplus account, as you have given during the years 1863, 1864, and 1865 what would have been the net surplus at the end of 1865?

$1,200,204.83

Q. Now, in the surplus, the gross surplus for 1866, the amount of $749,277.63 has been carried forward.

A. Yes sir.

Q. During the year 1866 what amount was charged against surplus on account of new buildings?

A. $2,814.05

Q. On account of rebuilding bridges?

A. $55,527.22

1902 Q. On account of rebuilding telegraph lines?

A. $2,300

Q. On account of union depot at Indianapolis?

A. $1,300

Q. On account of new baggage cars and freight cars?

A. $9,891.60

Q. On account of real estate purchased at Indianapolis for depot purposes?

A. $14,000.

Q. What is the aggregate of those amounts that I have given you with the similar amounts during the years 1863, 1864 and 1865?

A. $548,460.07

Q. Taking the net surplus, as it appears on our Exhibit 47, and upon the secretary's statement, if these charges during the years 1863 to 1866, inclusive, had not been made, what would have been the net surplus at the expiration of the year 1865?

A. $1,377,305.77

Q. During the year 1867 the gross surplus, before making any charges for that year, as shown on Exhibit 47, amounted to what?

A. $1,373,422.74, which includes the net balance of 1866.

Q. And it also included, as credits, these items that I have heretofore given you?

A. Yes sir.

Q. During that year what if any sum was charged to the surplus on account of new buildings?

A. $7,250.22

Q. What for union depot extension at Indianapolis?

A. $5,500.

Q. What for rebuilding bridges?

1903 A. $4,830.26

Q. What for new freight cars?

A. $23,827.54
Q. What for new water stations?
A. $7,928.69
Q. And for new turn-tables?
A. $1,999.22.
Q. What for real estate for depot grounds?
A. $399.37
Q. What is the aggregate of these items for this year including the similar items during the years 1863, 1864, 1865 and 1866?
A. $600,195.37
Q. Taking the net surplus for the year ending November 30, 1867 as it appears upon Exhibit 47 and upon the secretary's statement, if these several items had not been charged during the years 1863 to 1867, inclusive, what would have been the amount of the surplus at the end of the year 1867?
A. $1,401,120.74
Q. What was the gross amount of the surplus at the close of the year 1868 before the charges had been entered against it?
A. $1,357,134.26
Q. What, if any, sum was charged during that year to surplus on account of new locomotives?
A. $10,000
Q. New buildings?
A. $6,325.76
Q. New track scales?
A. $1,232.18
Q. New engine house at Terre Haute?
1904 A. $1,878.05
Q. Construction of North branch?
A. $8,517.38
Q. New sidings?
A. $20,766.31
Q. New turn-table?
A. $2,342.61
Q. Real estate bought during the year for depot grounds?
A. $326.65
Q. New freight cars?
A. $71,877.16
Q. What was the total amount of these new items during the year 1868, and what including these previous years?
A. Do you want them separate?
Q. Separate.
A. For this year is $123,266.10
Q. And for all the previous years from 1863 to this year?
A. And including previous years, the amount is $723,461.47.
By Mr. PICKENS: How much did you put down for new freight cars this year?
A. This year $71,877.16
Q. That is $17,877.16, is it not?

Mr. WILLIAMS: No sir, it is not; it is $71,877.16
Mr. PICKENS: Then it is a mistake in my copy.

By Mr. KETCHAM:

Q. Now, taking the net surplus at the end of 1868 if these new buildings and new construction and new equipment, the details of which have been given you had not been charged to surplus, what would have been at the end of 1868 the net surplus of this company?

1905 A. $1,680,739.84

Q. What if any amount was charged to surplus during the year 1869 on account of new engine houses?
A. New engine house at Terre Haute $16,589.09
Q. North Branch construction?
A. There is more engine houses.
Q. If there is more engine houses put them there together.

The MASTER: There is one at Brazil.
The WITNESS: New engine houses, $16,716.81.

Q. New machine shops and car houses—two items there.
A. $1,477.87 and $17,875.35
Q. North Branch construction?
A. $61,771.51
Q. New freight cars?
A. $67,247.52
Q. Construction of Mill branch?
A. $26,182.73
Q. Construction of South branch?
A. $1,102.20
Q. Construction of Masten branch?
A. $8,647.52
Q. Construction of the Williams branch?
A. $2,594.86
Q. New locomotives?
A. $23,500.
Q. For new sidings?
A. $22,396.46
Q. What was the total amount for the year 1869 charged to surplus on account of these new constructions, and what was the aggregate included from 1863 to 1869?

1906 A. The total for 1869, $249,512.87

Q. And the aggregate?
A. $972,947.34
Q. And but for these charges to the surplus what at the end of the year would have been the surplus of the road?
A. $2,022,339.37
Q. What was charged to surplus during the year 1870 on account of new locomotives?
A. $80,459.90
Q. New engine houses?

A. $3,905.70 and $27,763.34 and $32,829.64
Q. New water stations?
A. $9,769.20
Q. New buildings?
A. $8,495.32
Q. Construction of North branch?
A. $8,304.86
Q. Construction of the Masten branch?
A. $5,070.12
Q. Construction of Stunkard & Ensley branch?
A. $2,626.93
Q. Construction of the South branch?
A. $51,651.33
Q. Construction of the Mill branch?
A. $806.05
Q. Construction of new car house and boiler shop?
A. New car house $997.97: boiler shop $4,100.01
Q. And for construction of Crawford's switch?
A. $1,608.26
Q. New cars?
A. $61,517.63
1907 Q. New sidings?
A. $12,660.05
Q. New machinery?
A. $720.65
Q. What was the aggregate for the year 1870 of these new buildings and equipment, and what for the years 1863 to 1870 inclusive?

Mr. WILLIAMS: Mr. Ketcham, permit me to call your attention, while he is figuring that, that the expenditures for new locomotives, for new freight cars and for new South Branch, or for South Branch construction, were credited to surplus that year as well as debited.

A. There are three items to come off there on this.
Q. I will get at that in a minute.
A. The aggregate for that year charged out is $313,286.96 There should be deducted from that, credited on the other side——
It is getting a little dangerous for me to go on; I am liable to make mistakes; I cannot see in this light.

Whereupon, the hour of five o'clock having arrived, the further hearing was continued until Wednesday, November 1st, 1899, at two o'clock p. m.

1908 THURSDAY, *November* 2, 1899.

Morning session.

The parties met pursuant to adjournment.
Present: The same as before.

The re-examination of GEORGE C. DUY was continued as follows:

Questions by W. A. KETCHAM, Esq.:

Q. Now, Mr. Duy, when we separated some time in the past we were inquiring about items of surplus,—items charged to surplus account during the year 1870. There have been charged to surplus account for that year three items, one for new locomotives $80,459.90, one for new freight cars of $61,517.63, and one for South Branch construction $51,651.33; and you have answered that the aggregate for that year charged out on account of several items that had been given to you and that you had footed up was $313,286.96. Mr. Williams thereupon called our attention to the fact that surplus account had been credited with those three last items. What do those three items aggregate, $80,439.90; $61,517.63; and $51,651.33

A. $195,628.86

Q. Now, deducting that amount from the $313,286.96, what do you have as the net amount that was charged to surplus for that year and that remained in surplus?

A. $119,658.10

Q. The surplus account at the end of the year stood at what?

A. $1,095,523.36

1909 Q. Now prior to 1870 you had given on page 720 of the evidence the aggregate of the charges to surplus account as $972,974.34 If you add to that the balance that remained in surplus account in the year 1870, what was the aggregate from 1863 to 1870 inclusive of the charges to surplus on account of the various items that you have heretofore given?

A. $1,092,632.44.

Q. Now, but for the fact of these charges to surplus having been made during those previous years, taking the surplus account that at that time stood on the books, what would the surplus account have stood at, at the close of 1870 if those items had not been charged to surplus?

A. $2,188,155.80.

Q. Now, with respect to those three items: the item of $80,459.90 for new locomotives, and $61,517.63 for new freight cars appear to have been charged to equipment, were they not?

A. Yes sir.

Q. And therefore that took them on the other side of the account?

A. Yes sir.

Q. The item of South Branch construction didn't go to equipment, did it?

A. No sir.

Q. What account did that go to?

A. It went back to South Branch construction.

Q. What occasion was there for taking that back to South Branch construction as a matter of bookkeeping?

A. I don't think anybody can tell at this time.

Q. As a matter of fact that, with some other charges,
1910 appears on account of South Branch construction to have been charged to surplus account during the next year, does it not?

A. Yes sir, I think so.

Q. In what item?

A. $62,065.51

Q. Could you from any explanation that was made upon the books, either journal ledger or records that you have examined, ascertain any reason, from a bookkeeping standpoint, or from any other standpoint, why that amount of money, having been expended and charged to surplus should have been credited to surplus and put back into South Branch construction?

A. South Branch construction, account on Ledger D page 427, shows at the end of 1870 an aggregate debit of $51,651.33; on Journal D page 553 under date of November 30th, 1870, that amount is charged to surplus account without any explanation excepting the words "balance transferred." On the same date, November 30, 1870, on page 552 of journal surplus is credited and that same amount is charged back to South Branch construction without any explanation except the same words, "balance transferred." It seems to me to be merely a method of transferring the balance instead of simply carrying it over on the ledger. I cannot suggest any other reason for it.

Q. What effect did that last entry have on surplus? Increase it or diminish it?

A. That entry diminished it. No, the last entry increased it again. The first one diminished it and the last one increased it. They were both made on the same day and I cannot conceive
1911 any reason except by that means he carried forward that balance to a new account, desiring to have the whole South Branch construction account in one item.

Q. That is, that the South branch not yet having been completed it was desirable as a matter of bookkeeping to keep the account open until the full amount should be ascertained.

A. Possibly so, and yet that don't account for that entry, because there was no necessity to make that entry.

Q. There was no necessity to charge it to construction in the first instance.

A. No sir; charge it to surplus you mean.

Q. Charge it to surplus I mean. Apparently the entries with reference to this South Branch construction so far as surplus was concerned were both made at the same time and at the end of the fiscal year.

A. Yes sir; let me see. (Looking at printed report) I think it must be evident that it is only a transfer of the balance because in

his statement C of the printed reports of that year that item is reported as a debit balance on the ledger at that date.

Q. I wish you would go now to the year 1871 and tell me what upon the face of the books at the end of the year before any items were charged to surplus, was the surplus account.

A. $1,135,908.99

Mr. WILLIAMS: That was after charging it?

Mr. KETCHAM: Before charging it I mean.

The WITNESS: Before charging it, $1,62 679.95

Q. I will call your attention now to a number of items of
1912 the same general character that I have asked you in regard to heretofore, namely.: T. H. & I. extension real estate $2,900; new water stations $541.81; new buildings $5,479.85; new boiler shop $1,689.85; North Branch construction $12,350.29; construction of the Crawford switch $85.40; and of the Brazil furnace etc., $5,989.86; of the Mill branch $273.36; the Armstrong switch $9,972.33; and of the South branch $62,065.51; new sidings $8,165.85; Westinghouse air brake $10,160.20; new machinery $493.64; new traverse table $792.64; new freight cars $37,042.92; and get you to give me the aggregate of those several items charged to surplus account in the year 1871?

A. $157,122.51

Q. Adding this amount to the aggregate of the various items of similar character that I have heretofore given you from 1863 to 1870 inclusive that were charged to surplus what do you have as the aggregate charges to surplus on account of these items from 1863 to 1871 inclusive?

A. $1,249,754.95

Q. What at the end of 1871 appeared upon the books to be balance in the surplus account?

A. $1,135.908.89

Q. Now if these various items had not been charged to surplus account during those years what at that time would have been the balance to the surplus account, there being no other change in the books?

A. $2,385,663.94

Q. Now a moment ago you were explaining about the South Branch construction during the year 1870 that it was originally charged to surplus and *and* then credits to surplus and charged to
South Branch construction. This year, in 1871, total of
1913 South Branch construction aggregating $62,063.51 was credited to South branch and charged to surplus, was it not?

A. Yes sir.

Q. So that that brought in as a charge to surplus the $51,651.33 that had originally — brought into surplus in 1870 but taken back and carried back into South Branch construction again in connection with some additional charge in 1871.

A. Yes sir.

Q. Now in 1872 I call your attention to some items of a similar

character charged to surplus account. Bridge superstructure $2,201.56; ballast $942.05——

A. (Interrupting.) If you will allow me to suggest, that those were credited to surplus account.

Q. Now I will get you to look at Exhibit 48, profit and loss account under date of 1872, on Exhibit 48 at page 13 and I will ask you to look at Exhibit No. 55 at page 5 and see if you find any item there that was charged to surplus in connection with any transactions similar in character to that we have been inquiring about?

A. I find a charge to profit and loss November 30, 1872, for construction and equipment account $231,125.56

Q. Now what do you find on Exhibit 47 with respect to that $231,125.56?

A. I find on Exhibit 47 page 11 a copy of an entry from the journal, surplus account, by railroad, cost of. That is a charge to railroad, cost of, and a credit to surplus account; for amount transferred the same being expenditures for additions and betterments to the road equipment during the year ending November
1914 30, 1872, $207,087.30. The above with $24,038.26 additional was originally closed into profit and loss from construction and equipment; see entry, folio 253; and from there into surplus account. The expenditures for additions and betterments to road and equipment is made up of the following items, to-wit:

For bridge superstructure	$2,201.56
" ballast	942.05
" freight cars	82,476.35
" cross-ties	4,541.89
" engine houses	7,768.87
" grading	15,234.51
" iron rails	36,701.77
Machinery for shops	13,239.78
Locomotives	23,171.63
Machine shops	10,043.38
Real estate	4,490.50
Station houses	4,275.01
Total, for the year 1872 as above	$207,087.30.

I have a note there: "This expenditure $207,087.30, as stated by the president in the report of January 1873 was for 'The extension of branches in the coal fields of Clay county and purchasing equipment and providing other facilities, the necessity for which was referred to in our last report. That charge to profit and loss with other charges, less the credits to profit and loss leaves a balance on the debit side of $156,853.17, and profit and loss account is closed by transfer of that account from the surplus account which
1915 credits it to profit and loss and charges it to surplus account. By the transactions of that year in profit and loss account surplus account was reduced $156,853.17

Q. And was it reduced on account of this item of $24,038.26?

A. I don't mean to say that the balance of surplus account from 1871 to 1872 was reduced by that amount but after giving a credit to surplus of $207,087.30, then this charge should be added to the balance of surplus and then $156,853.17 taken off.

Q. Was the item of $24,038.26 which was included in the $231,125.56, being a part of the construction and equipment account for the year 1872 on page 7 of Exhibit 55, charged to surplus account?

A. No sir, it was charged to profit and loss account.

Q. Well it was charged to profit and loss account, then how did it get into surplus account? When profit and loss account was transferred to surplus?

A. It would be included in that one hundred and fifty-six thousand dollars of balance.

Q. And the practical effect of it would be the same as though the $24,038.26 had been in the first instance charged to surplus account so as to reduce it?

A. Yes sir.

Q. Now at the expiration of the fiscal year 1872 what — the balance of surplus account as shown by the book?

A. After the charge to surplus of the one hundred and fifty-six thousand dollar item the balance was $1,186,143.12

Q Now, if to that you should add the amounts that you have heretofore given, the aggregate of the amounts that you have
1916 heretofore given from the year 1863 to 1871 inclusive and in addition this amount of $24,038.26 all of which as I understand you have been in the entries that you have given charged to surplus so as to reduce it, what would have been on the 30th of November, 1872, the surplus account of the railroad in the event these charges from 1863 to 1872 to surplus account had not been made?

A. $2,459,936.33

Q. So that, but for those various charges commencing with the year 1863 and running from that to the close of the year 1872 the surplus account in lieu of aggregating $1,186,143.12, would have aggregated what sum?

A. The balance would have been $2,459,936.33

Q. The year 1863 was the first year immediately preceding the declaration of the twenty-five per cent. stock dividend, was it not?

A. Yes sir; that was declared in April 1864, I believe on the business of the preceding year.

Q. Now I wish you would take Exhibit No. 14, that is the statement of the transactions with the Evansville and Crawfordsville Railroad Company. What amount upon the investment in the stock of the Evansville and Crawfordsville Railroad Company, eliminating in this consideration the amount of dividends in stock of $3,779.89, but taking simply the amount of money invested by the Terre Haute and Indianapolis road in the Evansville and Crawfordsville Railroad Company's stock, was charged to profit and loss,

and through profit and loss resulted in a diminution of the surplus account.

A. $17,230.52

1917 Q. Now will you explain just how that amount was reached? State the investments and the date, and the amount.

A. February 3, 1854, invested $11,650; November 22, $[illegible],000; January 22, 1867, $1,115; that made a cash investment of $21,765; in addition to that the company received in stock of the Evansville and Crawfordsville road——

Q. I am asking you to eliminate that, Mr. Duy.

A. I cannot explain it without.

Q. All right; go on.

A. For interest accrued on stock they had held before December 30, 1853, $3,379.89 which they treated as an earning and credited to profit and loss account the same as an investment. That left the investment $25,544.89, the cost of the stock on the books. November 30, 1867 they charge off in a re-valuation of that stock $21,010.41, deducting from that the $3,379.89, which was not a money investment, leaves the actual loss on the invested money $17,230.52, which was charged to profit and loss account.

Q. And from profit and loss account where did it go? Whether that year or at other times?

A. It goes into surplus every year one way or the other.

Q. So that as a result of the investment in the Evansville and Crawfordsville stock, surplus was diminished to the amount of $17,231.52?

A. Yes sir.

Q. Now I wish you would go to Exhibit No. 17, the transactions with the Terre Haute, Alton and St. Louis Railroad Company and I will ask you to state whether as the result of the transactions with the Terre Haute, Alton and St. Louis Railroad Company by

1918 the Terre Haute and Indianapolis Railroad Company there was any diminution either directly or through the profit and loss account in the surplus account, and if so what was the amount of it and how it arose?

A. There was an account running with the Terre Haute, Alton and St. Louis Railroad Company beginning November 14, 1857. Ledger B, page 21, which continued through 1858 and amounted to $85,209.31 Various credits on that account reduced it to $63,859.82, and on the 14th of December, 1858, the Terre Haute and Indianapolis Company took in settlement of that account two notes aggregating that sum of $63,859.82 In 1859 on January 14 they received another note for $3,119.42 for interest accrued on the former note. In 1859 on February 28th the account was re-opened and amounted to $10,075.11 and there were certain credits on it which reduced the balance to $8,115.59 and before that the T. H. & I. Company took a note September 1st, 1859 for that amount, $8,115.59 There was a further credit in 1859 amounting to $2,619.79, which was settled by an acceptance. On journal page 313, the treasurer is charged and bills receivable account is credited with a draft of R. Tousey,

treasurer, for the amount of the last described acceptance, $2,619.79, leaving at that date unpaid one note for $3,119.42; one note for $62,946.97; one note for $912.85; and one note for $8,115.59; aggregating $75,094.83. Those notes were merged into judgments in the Vigo circuit court of $94,552.59 and those judgments were settled under date of November 30, 1862——

1919 Mr. HAWKINS: 1862 or 1863?
The WITNESS: 1862 according to my exhibit.

and the company received bonds of the St. Louis, Alton and Terre Haute railway, thirty-seven income bonds of one thousand dollars each, $37,000, one bond for $500, and fifty-seven preferred bonds of one thousand dollars each, $37,000., and scrip $52.59, making the total of the judgment and interest up to that date $94,522.59 which is passed to the debit of an account and title St. Louis, Alton and Terre Haute Railroad Company second mortgage bonds. It appears from entries on Journal C that those bonds were sold. October 12, 1863, there was a credit of amounts deposited with Farmers' Loan and Trust Company by Corning & Sons, agents for sale of bonds, $54,290.32; October 24th, another credit, money deposited by same $31,405.74; and December 1st, 1863, there is a credit to that account of May interest on bonds held by the company $2,204.68; and the balance of that bond account is charged to profit and loss December 1st, 1863, for amount of loss on the sale of bonds taken at par and sold at a discount $6,651.85

Q. In what manner and at what date are these transactions incepted and by what evidence of indebtedness or securities was the investment by the road evidenced in the beginning?

A. The account was opened as I stated November 14, 1857, Journal B, page 165, and I read a quotation of the entry, "Terre Haute, Alton and St. Louis Railroad Company to treasurer; for the following acceptances held by him taken from the T. H. A. & St.
1920 L. R. R. Co., on settlement of orders of their freight agent and charges delivered to said R. R. some of which having been due and remaining unpaid, a contract was made dated St. Louis, November 14, 1857, by which the R. R. company agrees to pay the T. H. & R. R. R. Co. $2,500 weekly until the indebtedness is paid. The acceptances herein enumerated are held as collateral to it; Thomas Allen's draft on cashier on the T. H. A. & St. L., dated September 30, with interest from September 8, 1857, $17,162.50, less credit November 5th, for $2,726.96; $14,435.54; Thomas Allen's draft on same dated September 30, 1857 with interest from September 8, $17,162.50 For the following acceptances of Valintine and Co., drawn by Thomas Allen, treasurer, in favor of L. R. Sargent and by him indorsed, dated St. Louis September 7, payable in New York, to-wit: one at thirty days from September 7th, $5,000; one at forty-five days ditto: $5,000; one at sixty days, ditto, $5,000; one at seventy-five days, ditto $5,000 one at ninety days $10,000; making thirty thousand dollars; carried out $61,598.04

Q. That so far as the books show——

A. (Interrupting.) Then there is a charge for damages on the Valentine acceptances, protested and cost of protest, $152.37

Q. What was the total amount that was charged to surplus account on account of these transactions with the T. H. A. & St. L.?

A. That balance that was charged to profit and loss $6,651.85 and went from there to surplus,

Q. I wish you would turn to Exhibit No. 15 and get the statement of the Evansville and Crawfordsville Railroad Exten-
1921 sion bonds, and I will get you to state whether on account of the transaction in the Evansville and Crawfordsville Extension bonds there was any charge to surplus or to profit and loss, and through profit and loss to surplus, and if so what was the amount of it?

A. November 30, 1867, there is a charge to profit and loss on account of re-valuation of those bonds of $15,825.

Q. Charging that to profit and loss, and did it ultimately go to surplus?

A. The result would be to make the surplus that much less than if they hadn't charged it off.

Q. Now, go to Exhibit No. 16, Indianapolis and Cincinnati Railroad Company's bonds and state if by reason of the investment of the Indianapolis and Cincinnati Railroad bonds, or loan, there was any diminution of surplus and if so, what was the amount of it and when?

A. February 24, 1869, there is a charge to profit and loss of $8,173.75, which appears to arise from a sale of the bonds for that much less than they cost.

Q. Prior to that time in November 30th, when there was a revaluation of divers and sundry securities, profit and loss had been charged with $10,000.

A. Yes sir.

Q. And this time profit and loss was credited with that $10,000 and charged with this amount $8,173.75, being the actual loss sustained on the transaction?

A. Yes sir.

Q. And I will get you to state whether that charge to profit and loss is repeated on the books of the company as a diminution of its surplus account in that amount?

1922 A. It would go there ultimately; it would have that effect ultimately.

Q. Here is a little one. Take Exhibit 19, Indianapolis and Madison Railroad Company bonds, stock; whether there was a charge to profit and loss, through profit and loss to surplus account on account of the investment in the income bonds of the Madison and Indianapolis Railroad Company and if so when the charge was made and what was the amount of it?

A. There is a charge August 1st, 1862 of $915.

Mr. HAWKINS: That is preferred stock, isn't it?

The WITNESS: No, that is on income bonds.

That original investment was in Madison and Indianapolis income bonds at a cost of $1,600; to that was added interest to August 1st, 1862, amounting to $630, and at that date the company took 26 shares of Indianapolis preferred stock at $1,300, $50 per share, and stock scrip for $15., making $1,315., and charged off to profit and loss $915. That preferred stock and scrip stood at $1,315. and was sold for $1,304.50, making a loss of $10.50 The total loss on the whole transaction seems to be $920.30, charged to profit and loss account.

Q. Now, Mr. Duy, I wish you would take Exhibit 20 and let us get a little better explanation how the transactions of the defendant road in its own stock bought in New York in 1867 resulted.

Whereupon, the hour of 12 o'clock having arrived, a recess was taken until 2 o'clock p. m.; the witness not having answered the question.

1923 THURSDAY, *November* 2, 1899.

Afternoon session.

The parties met pursuant to adjournment.
Present: The same as before recess.

The re-examination of the witness, GEORGE C. DUY, was resumed as follows:

Questions by Mr. KETCHAM:

Q. Now to begin with as I understand the first item on page 1, a transaction of $50,000, that the company had paid out $50,000 of its bonds that by there terms were negotitiable for its stock and upon that the company had issued to Mr. Rose as trustee, for it an equivalent amount of stock $50,000

A. They issued the stock to the road.

Q. To the road; and it was subsequently transferred to Rose as trustee and held by him for a long time.

A. Yes sir.

Q. Now that transaction occurred in November of 1866 and in and of itself had no connection with the New York transaction?

A. No sir.

Q. The only connection that it has with the New York transaction as I understand is that in charging up to profit and loss the excessive amount connected with the New York purchase that charge to profit and loss diminished to the extent of $25,000 by reason of an estimated $25,000 of additional value in this stock beyond the $50,000 of bonds that had been represented and through which the stock was issued.

1924 A. Yes sir.

Q. Now the five thousand dollars found on page 5, was, as I understand, $5,000 of stock that was issued in lieu of bonds 381, 2, 3, 4, and 5, which had been overdue for something over two (2)

years and was supposed to have been lost and that on that account and for that reason 100 shares of the par value of $50 each, being the same amount as the bonds represented, were issued to Mr. Rose, in trust for the company?

A. Yes sir.

Q. And $2,500 was credited to profit and loss on that account on the theory that that $5,000 stock was worth $7,500.

A. Yes sir.

Q. Those two transactions were not in any otherwise connected with the purchase of stock down in New York?

A. No sir.

Q. How much stock was purchased down in New York?

A. June 29th, 1867, $316,297.50; 3495 shares; July 6th, 1867 $117,650—1300 shares; November 18th, 1867, $92,287.50 for 1075 shares; $531,235 for 5870 shares.

Q. What was the face value of the stock?

A. The face value was $50 a share; the purchase price was $90.50.

Q. Now on account of that transaction if there was any amount charged to profit and loss or surplus you may state what it was.

A. On page 114, Journal D appears an entry charging profit and loss and crediting C. Rose, trustee, for difference between the cost and present value of the company's stock held by him $65,935.

What were you going to ask me?

1925 Q. I was going to ask what was the difference between the New York stock at $75. a share and the amount that they paid for it?

A. $237,735.

Mr. HAWKINS: What is the computation you made, Mr. Duy?

The WITNESS: $50. a share.

Mr. HAWKINS: The question is $75. a share.

The WITNESS: No, that is not what he asked me; he asked me the difference between the par value of the stock and what they paid for it.

Q. (Preceding question repeated)

A. $90,960.

Q. Well on account of that transaction there was a certain amount charged to profit and loss, what was that?

A. $65,935.

Q. Well that wasn't the amount of $90,000?

A. There was a $25,000 credit given.

Q. There was more than that, wasn't there?

A. No; I think I have got that entry here.

Q. 6872 shares? They picked up two shares there.

A. They picked up two shares that they didn't buy in New York and that made the difference.

Mr. PICKENS: What did you make that? $65,935?

The WITNESS: $65,935 is the amount charged off.

Q. $65,935, the amount charged off was less than the actual dif-

ference between the stock at the price they bought it and the
1926 stock at the price it was worth, or estimated to be worth, $75 per share, by reason of the fact that there was credited in it that $25,000 and some other amounts on account of the other stock?

A. Yes sir.

Q. That charge to profit and loss, what became of it; did it go into surplus?

A. Ultimately it effected surplus; I don't remember whether it was charged that year or not.

Q. Whether it was charged that year or not, or whether the profit and loss balance was taken to surplus, it effected surplus in what way, diminishing the surplus?

A. Yes sir, diminishing it from what it would have been if that charge had not been made.

Q. And that diminution was less by $25,000 than it would have been but for the stock that they issued to themselves on account of that bond transaction?

A. Yes sir.

Q. Now prior to the dividend—I wish you would take in that connection dividend sheet Exhibit 44——

A. Do you want to get at the dividends on this stock?

Q. I want to ask you about it, yes.

A. You will find a statement of it on the last page of No. 20

Q. Now, turning to page 8 of Exhibit 20 the New York, the stock that came from New York, did not participate in the dividend of December, 1866, did it?

A. No sir, it was bought in 1867, all of it.

Q. At the time of declaring the December dividends in 1866, what was the amount of stock outstanding that participated in the dividend? Look at page 1 of Exhibit 44.

1927 A. I don't see that the amount of stock stated anywhere.

Q. Well on page 21 of Exhibit 44—1866

A. It don't give the shares; it gives the amount.

Q. No it says six per cent. dividend on $1,983,150—$607,450.; that was the total stock participating in that dividend $1,983,150., was it not?

A. $1,988,150.

Q. Nine eighty-three, was it not?

A. $1,983,150., yes sir.

Q. And the only stock that the company owned that participated in that dividend was the $50,000.?

A. Yes sir.

Q. What was the Government tax paid on that dividend?

A. $6,262.55

Q. Where was that charged to?

A. Charged out of surplus or profit and loss, I can't tell which.

Q. Well, if charged out of profit and loss or surplus either one, it ultimately came out of surplus, did it?

A. It would effect surplus, yes.

Q. And even if it came out of transportation it would have effected surplus as if charged directly to surplus?

A. Yes sir.

Q. It is true that by that $6,232.55, the surplus was diminished on account of the $50,000 of stock held by the company in the proportion that $50,000 bore to $1,983,150.?

A. Yes sir.

Q. Now take the next dividend; that was July 1867; to what extent did the company in the stock that it held either di-
1928 rectly or through the intervention of the trustee, participate in that dividend?

A. $20,610.

Q. That was the amount?

A. Yes.

Q. But what was the stock—the amount of the stock of the company that participated in that? Can you get at it by dividing it by the six per cent. dividend, Mr. Duy?

A. I think it was 4495 shares.

Q. Wasn't it 6870 shares, Mr. Duy, it was a six per cent. dividend that realized $20,610; wouldn't that represent six per cent. on $343,500. The dividends of course were on the par of the stock and not on what it stood at on the books.

A. Yes, I guess so; the first dividend of 1867 was declared July 6th as I have it here.

Q. Yes, sir.

A. And at that time they owned 5795 shares of the New York stock. And they also owned a thousand shares, making 6795 shares.

Q. Wasn't it 6870, Mr. Duy?

A. I don't know where you get it. Maybe I have skipped one purchase.

Q. Well, turn to Exhibit 20 at page 8, the second item charged July 18th, referring to Journal D, page 60, dividend July 3, 1867, $20,610. Now, turning to Exhibit 44, at page 21, that July dividend of 1867 appears to have been six per cent. dividend.

A. Yes sir.

Q. Now, in order to realize $20,610 on a six per cent. dividend didn't they have $343,500 of stock—6870 shares; see if you cannot figure out 6870 shares, Mr. Duy?

1929 A. I cannot figure that out at all.

Mr. WILLIAMS: How many shares did you make it, Mr. Duy?

The WITNESS: They purchased 5870 shares in New York and one thousand shares; and two shares they picked up.

Mr. WILLIAMS: If you add 5870, and one thousand out there it makes 6870.

The WITNESS: Yes, but they hadn't bought all that 5870 at that time; yes they did too; the next purchase of stock is in November.

Q. Well, whether they bought that last 1075 shares of Mr. Bron-

son down in New York or not they did get the dividends on it and treated it as though they had bought it, didn't they?

A. That is the way it looks, yes sir; that is the way I was figuring on.

Q. They probably had an outstanding contract of purchase that they hadn't fully completed up to that time.

A. That is what it would be.

Q. Now the Government tax on that dividend was $6,262.55 again, was it not?

A. Yes sir.

Q. The total stock outstanding at that time was $1,983,150, was it not?

A. Yes sir.

Q. And there was a charge to surplus on account of the dividends on this company's stock, in the same proportion of the $6,262.55 that the $343,500 would bear to the $1,983,150?

A. Yes sir. I cannot figure it at all; I cannot see how to get it.

1930 Mr. WILLIAMS: Would you permit me to suggest something?

Mr. KETCHAM: Yes.

Mr. WILLIAMS: The tax was three per cent.

Mr. KETCHAM: Well it wasn't all the time.

The WITNESS: Another complication enters into that; the Government collected a tax on tax all the time.

Mr. WILLIAMS: I was going to say this: In addition to that they took the three per cent. on the dividend, added that to the dividend and then took three per cent. on the aggregate amount to represent the tax; they paid a dividend tax on the dividend, plus the tax, is the way it is figured, as you will see.

Mr. WINTER: In other words they counted the tax as a part of the dividend.

Mr. HAWKENS: And then from the sum they levied a tax of three per cent.

The WITNESS: That won't bring it.

Mr. WILLIAMS: It will bring it within a few dollars on every dividend, Mr. Duy. The first dividend declared figures out entirely that way; you take three per cent. of the dividend and add it to the dividend and then take three per cent. of that aggregate and it gives you the exact amount of the tax paid; but after that I think there must have been some stamp duties in addition to the three per cent. tax because it lacks fourteen dollars and something, or fifteen dollars and something—an odd small amount all the way through.

1931 Q. Well, Mr. Duy, from that dividend, forward in July 1867 the stock held by the Terre Haute road whether in the name of Rose, trustee, or otherwise, participated in the dividends, in every subsequent dividend that was declared as shown by that Exhibit 44.

A. Yes sir.

Q. And the proportion of the Government tax exacted at each dividend paying period that was charged to surplus on account of

these stocks that were held and these dividends declared, in each instance would be in the same proportion that the $343,500 of stock held by the company bore to the total stock outstanding at the time that dividend was declared.

A. Yes sir, that is so.

Q. And it stood at $1,988,150 until after the December dividend in 1867 which was $1,991,150, first at the July dividend in 1868, and became $1,988,150 at the December dividend in 1868.

A. Yes sir.

Q. Now, if you will hereafter furnish us with a statement showing what amount was charged to surplus on account of the Government tax on these dividends declared from December 1866 until the Government tax was no longer collected, I will be obliged to you, and will have your testimony later.

It is true then, is it not, Mr. Duy, that to the extent of the Government tax upon the dividends upon the stock held by the company from November 1866 until January 1873 were paid, the surplus of the company was diminished and in November 1872 was that much less than it would have been had not the Government tax been paid by reason of the company's holding that stock?

1932 A. Take off that last clause there, "by reason of the company's holding that stock" and I should answer certainly, but I don't think it makes any difference in the reduction of the surplus whether the company held the stock or somebody else; it was reduced by that much upon the stock held by the company.

Q. Yes sir; but if there hadn't been any stock at all?

A. Well, then of course it would have been reduced by that much.

Q. If there had been no stock at all there wouldn't have been any tax.

A. No tax and dividend.

Q. No tax and no dividend and therefore there would have been no reduction.

A. That is right.

Q. Now, as against the amount, whatever it may be, that the cash was diminished by reason of the investment of this sum as heretofore given in the New York stock, there was credited to surplus, was there not, the dividends upon that stock?

A. The dividends on the stock were credited to surplus, or profit and loss,—the same thing.

Q. And as shown by Exhibit 44 at page 21, those dividends consisted of six per cent. in July, and eight per cent. in December of 1867; six per cent. in July and December of 1868; six per cent. in June and December of 1869; six per cent. in June of 1870; six per cent. in January, July and December of 1871; six per cent. in July of 1872; six per cent. in January of 1873, and the subsequent dividend, not shown on this, but which was heretofore testified to by you of one and a half per cent. for the proportion of the year 1873?

1933 A. Yes sir.

Q. Those dividends of course were upon the face value of the stock?

A. Yes sir.

Q. And by the difference between the amount paid for the stock down in New York and the dividends that went into the treasury of the company after the stock was purchased, the cash assets of the company were diminished and remained diminished at the end, in January 1873?

A. The cash was diminished that much.

Q. Yes, and they still had the stock for whatever it might be?

A. Yes sir.

Q. I will ask you to turn to the ledger for April 1864, and tell me what the cash was in the hands of the treasurer on the 6th of April, 1864?

Mr. WILLIAMS: On the 6th of April?

Mr. KETCHAM: That is the intermediate period,

Mr. WILLIAMS: You asked it as of the 30th of April 1863 and 30th of November 1864, but not for this intermediate period.

A. I confess that I cannot see on this book.

Q. Is there a footing that you can see preceding the 4th of April?

A. That is what I cannot see; the balance against the treasurer is $191,622.39; that is as near as you can get to it from this book, the actual balance on that day; the treasurer's cash book might vary a little either way.

1934 Q. Now, I wish you would turn to Exhibit No. 18, St. Louis Vandalia and Terre Haute, At the date of the last report of the secretary, prior to January 17th, 1873, what amount of securities and what were they, of the St. Louis, Vandalia and Terre Haute road that were held by the Terre Haute and Indianapolis road?

A. The securities were St. Louis, Vandalia and Terre Haute Railroad Company's stock $265,000.

Q. Anything else?

A. St. Louis, Vandalia and Terre Haute Railroad Company's bonds $364,500.

Q. Those two items represent the entire investment at time that the Terre Haute and Indianapolis Railroad Company had, so far as the books disclose, in the St. Louis, Vandalia and Terre Haute road?

A. Yes sir.

Q. Had there been any entry on any book or otherwise which you observed, showing a recasting or re-valuation of these assets? Whether any amount was charged to profit and loss or any entry with reference to that been made?

A. I don't remember any entry about any re-valuation of these asstes?

Q. If there was a loss on them it had not been ascertained? The stock had not been sold, nor the bonds?

A. Of those that were held then?

Q. Yes they held them until after January 17th, 1873, didn't they?

A. Yes sir.

Q. And unless there was some recasting they of course would stand on the books as they originally cost the company?

1935 A. Yes sir; they ought to.

Q. And there is nothing in the books to show what that value of $265,000 of preferred stock was?

A. No sir.

Q. Is there any entry other than the entry to which Mr. Williams called your attention on his cross-examination, where there was a recasting of the accounts between the Terre Haute and Indianapolis road and the Vandalia by which there was charged to profit and loss the sum of about $14,000, (Mr. KETCHAM: Do you remember that amount, Mr. Williams? Mr. WILLIAMS: No, I don't remember it.)—indicating either that the Terre Haute road in any of its departments made any money or that it lost any money by reason of its connection with the Terre Haute, Vandalia and St. Louis road?

A. No I think not; I have in mind the fact as reported that when they took possession of the Vandalia road they organized two divisions, one, the road from Indianapolis to Terre Haute, which was the Indianapolis division, and the other was called the Vandalia division, which included the seven miles of the T. H. & I. track.

Q. That is the extension?

A. The extension; and at a period subsequent to that——

(By Mr. HAWKINS:)

Q. And also from there to St. Louis.

A. Yes sir; I said which valuation included that; and at a period subsequent to that my recollection is that there appears a credit of the proportion of the earnings of the Vandalia division on that seven miles, and I think that goes into transportation account with other earnings. Aside from that I do not now recall and do not

1936 think there is any entry on the books showing either a profit or a loss by the operation of the Vandalia road.

Q. I will call your attention to the entry on page 5 of Exhibit 18 and I will ask you if at any time there was entered prior to January 17th, 1873, any interest on the 214 seven per cent. income bonds that were held by the Terre Haute road?

A. No sir.

Q. What amount of interest was there on those bonds up to the 17th of January 1873?

A. Those bonds as appears by the books of the company were held until December 29th 1874. At that date Journal E, page 579, interest was added on 174 bonds.

Mr. HAWKINS: 174 or 215?

The WITNESS: 174 bonds and on 40 bonds. This interest was added on the 174 bonds from their date and on 40 bonds from March 1st, 1872 to date of the transaction. That was in 1874; and then they were exchanged for preferred stock of the same road.

That amount of interest up to 1874 amounting to $43,383.33 The interest on these same bonds estimated from the same dates up to the 15th of January, 1873, amounts to $25,287.50, which would be the proportion of that interest subsequently collected, which accrued up to the time of the surrender of the charter.

Q. Now I wish you would turn, Mr. Duy, to page 127 of volume two of the records and see what entry is there with reference to the loan of $800,000, or the issuing of $800,000 of the bonds?

A. (Reading.) "Resolved that the president be authorized and directed to issue eight hundred (800) bonds of
1937–1950 the company of one thousand dollars each redeemable in ten years, to bear seven per cent. interest, payable semi-annually at the Farmers' Loan and Trust Company in the City of New York on the first days of April and October, each year, said bonds are to be issued for the purpose of raising money to extend the road of this company to the Illinois State line and to build the double track from Terre Haute to Indianapolis."

Mr. KETCHAM: Have you got a printed copy of that mortgage, Mr. Williams?

Mr. WILLIAMS: No, Mr. Ketcham, not of that mortgage.

Mr. KETCHAM: I have a typewritten copy that I didn't bring over; Mr. Winter had it prepared, and it came from his office; he had it copied, but I have not had it certified. Will you require it to be certified?

Mr. WILLIAMS: No, I think not; who made it?

Mr. WINTER: I had my stenographer make it; he went over there to the court house and copied it from the records.

Mr. WILLIAMS: All right.

Mr. KETCHAM: I will offer that in evidence now as Exhibit 57, and will bring it over and the reporter can identify it as admitted evidence.

The said document being typewritten copy of the mortgage securing $800,000 of bonds of the Terre Haute and Indianapolis to the Farmers' Loan & Trust Company of New York, dated July 1, 1869, was admitted in evidence, and thereafter the same was delivered to the reporter and marked "Exhibit 57, Nov. 2, 1899, R. Evans, rep." and the same is in the words and figures following, to-wit:

(See next page.)

1951 Q. Now, Mr. Duy, I wish you would turn to the president's report for 1870 at pages one and two and if you find there any reference to the operation of the St. Louis, Vandalia and Terre Haute road, I wish you would read it. Pages one and two of the president's report and pages one and two of the superintendent's report for the year 1870.

A. It is on page 6. It begins on the back of page 5, I suppose is what you want. (Reading:) "In consequence of the large amount expended for equipment, and building of branches as above stated, and also of the excess of cost of the estimates of building the Van-

dalia road, it was found necessary to dispose of the remaining two hundred thousand dollars of bonds of the company. For the amount so paid out on account of the Vandalia road, the company has received certificates of stock in that road. It is also proper to say that the Pennsylvania Railroad Company advanced its proportion of the excess of cost of the Vandalia road, above referred to and received stock in payment. The business of the road has been satisfactory, and shows no diminution in tonnage although there is a decrease in receipts. The causes of this are referred to in the report of the general superintendent, hereto appended. It is to be hoped that by increasing the equipment, and thereby the local trade, this will, to some extent, be remedied in the future; and that the ruinous competition of the eastern trunk lines, and the low rates of through freight, will cease to show so depressing an effect on the total earnings. The St. Louis, Vandalia and Terre Haute railroad
1952 was opened through to St. Louis for business on the 12th of June, and was taken possession of by this company, under the lease, on the 1st day of July. The business has quite equalled expectations, and is steadily increasing. The receipts for the five months ending November 30, 1870, amount to four hundred and forty-four thousand, four hundred and twenty-six dollars, and fifty-eight cents. By the terms of the lease, thirty per cent. of the gross earnings of the St. Louis, Vandalia and Terre Haute railroad are to be applied to the payment of interest on the bonds of the St. Louis, Vandalia and Terre Haute Railroad Company. As the interest on this debt amounts to three hundred and fifteen thousand dollars per annum, it will be seen that if the earnings per month should continue the same as for the past five months, they will net an amount sufficient to pay said interest. The same causes, however, which have affected the business on your road, have been felt in the business of the Vandalia road. It has been for so short a time completed as a through line, that it is difficult as yet to base any confident estimate on its future, but an increase of its equipment, and development of the resources of the country along its line, will enable us, after the current year, to depend with certainty on largely increased earnings."

Q. Now, what do you find in the superintendent's report at pages one and two, with reference to the Vandalia division?

A. (Reading:) "On the first day of July, the St. Louis, Vandalia and Terre Haute railroad was turned over to this company under the terms of the lease. By the lease, a separate return of the
1953 receipts and expenditures was required, and as a consequence, two operating divisions were formed of the joint line; that portion of the line between Terre Haute and Indianapolis (or the old road) was called the Indianapolis division and the line west of Terre Haute, including seven and one-tenth miles of the Terre Haute and Indianapolis road proper, was called the Vandalia division. As now organized, John E. Simpson is superintendent of the Indianapolis division, and John W. Conlogue is superintendent of the Vandalia division. The detailed report I submit, refers to the op-

erations of the Terre Haute and Indianapolis railroad proper; that of the Vandalia division is necessarily brief and imperfect and includes but five months of the fiscal year ending November 30."

Q. Now turn to the president's report for the year 1871, at page 6.

A. Pages 5 and 6. (Reading:) "The gross earnings of the St. Louis, Vandalia and Terre Haute railroad, of which this company is lessee, were one million fifty-three thousand one hundred and twenty-nine dollars and thirty-three cents. The operating expenses were seven hundred and sixteen thousand five hundred and three dollars and nine cents, leaving three hundred and thirty-six thousand six hundred and twenty-six dollars and twenty-four cents, as the net amount of transportation earnings. The thirty per cent. of gross earnings required to be paid by your company under the lease, was three hundred and fifteen thousand nine hundred and thirty-eight dollars and seventy-nine cents. The first and second
1954 mortgage bonds of the St. Louis, Vandalia and Terre Haute Railroad Company amount to five millions five hundred thousand dollars, bear seven per cent. interest, and require the payment of three hundred and fifteen thousand dollars per annum. Thus it will be seen that the thirty per cent. of gross earnings paid the St. Louis, Vandalia and Terre Haute Railroad Company exceeded that company's interest requirement nine hundred and thirty-eight dollars and seventy-nine cents; and that the net transportation earnings have exceeded the thirty per cent. gross earnings, twenty thousand six hundred and eighty-seven dollars and forty-five cents. Comparing the months of July, August, September, October and November of last year with the same months of the previous year, it will be seen that the earnings of the St. Louis, Vandalia and Terre Haute railroad have increased forty-seven thousand eight hundred and nineteen dollars and seventeen cents.

Whereupon the further hearing of this matter was adjourned until tomorrow morning at 10 o'clock a. m.

1955 FRIDAY, *November 3rd*, 1899.

Morning session.

The parties met pursuant to adjournment.
Present the same as on yesterday.

The re-examination of GEORGE C. DUY, was continued as follows:

Questions by W. A. KETCHAM, Esq.:

Q. Now, Mr. Duy, when we adjourned the other day I had asked you to ascertain what the amount of the proportion of the Government tax charged to surplus on account of dividends was applicable to the stock held by the Terre Haute and Indianapolis Railroad Company,—its own stock held by the Terre Haute and Indianapolis, Railroad Company. Have you prepared such a statement?

A. Yes sir, I figured it out this morning.

Q. I wish you would tell the reporter what it was by years and what the aggregate of it was.

A. December, 1866, on $50,000 stock $157.90
July, 1867, on $289,750 of stock 915.00
December, 1867, on $343,600 of stock 1,446.50
July, 1868, on $348,000 of stock 1,200.53
December, 1868 ..... 1,200.53
June, 1869 ..... 1,200.53
December, 1869 ..... 1,200.53
June, 1870 ..... 1,200.53
January, 1871 ..... 536.15
July, 1871 ..... 536 15
1956 December, 1871 ..... 536.15

Q. What was the aggregate of those items, Mr. Duy?

A. $10,130.50

Q. Now, Mr. Duy, you have heretofore given to me a number of figures of losses that were charged either to the profit and loss account and through that to the surplus or to the surplus directly, and I will give you the items and ask you to state to me what the aggregate of those amounts is.

Loss on Evansville & Crawfordville stock..	$17,230.52
On T. H. A. & St. L.	6,651.85
On the E. & C. Extension bonds	15,825.00
On Indianapolis and Cincinnati bonds	8,173.75
On Madison and Indianapolis bonds and pref'd stock	923.50
Terre Haute and Indianapolis stock	65,935.00
Terre Haute and Indianapolis Government tax on dividends	10,130.50

What is the aggregate of those amounts?

A. $124,872.12

Q. Now have you before you, Mr. Duy, the amount that you answered as to the surplus at the end of the year 1872 in the event the charges from '63 to '72 inclusive, the details of which you have heretofore given, have not been charged thereto.

A. I don't think so. It was two millions and something.

Q. Assuming that the amount that you had given in answer to the question that I had given you was $2,459,936.33, what at the end of the year 1872 would have been the surplus in the
1957 event these in addition to the elimination that heretofore been given—charges on account of these various items aggregating $124,872.12 had not been made to surplus account.

A. $2,584,808.45

Q. Now, Mr. Williams asked you with reference to particular years what there was in the company representing surplus and you gave in reference to a great many years amounts of cash and so forth. Does the item of cash or any other item represent surplus as

a matter of bookkeeping than any other item on the other side of the account?

A. No, I think not. The surplus is the balance between the two sides. It may be made up of any items that you could pick out. I think in going over I named cash and investments.

Q. Those are the items that naturally come to one's mind, as they are the ones that are easily accessible but as a matter of fact surplus is the excess of the debtor side of the account over the credit side of the account.

A. Yes, if there is any surplus to the credit of surplus account.

A. In some bookkeeping it is called profit and loss account?

A. Yes sir.

Q. And there are other different names for it, but it simply represents the excess of the assets over the liabilities on the books?

A. If there is an excess that way; more strictly spoken it represents the difference between the credits and the debits,—the
1958 credit and debit balances of the ledger which way it may be.

Mr. KETCHAM: Now gentlemen, if you will indulge us Mr. Duy is suffering from a headache and I will continue with Mr. Cleland for a while rather than to continue the examination of Mr. Duy. It will require figuring and I will ask Mr. Duy to stand aside and ask Mr. Cleland to take the stand.

JOHN E. CLELAND examined as follows:

Questions by Mr. KETCHAM:

Q. Mr. Cleland, I will call your attention to this Exhibit No. 54 recapitulation of stock account and I will ask you since the preparation of that exhibit if you have gone over the items carefully and corrected the exhibit so as to correspond exactly with the books?

A. We have, yes sir.

Q. Now I will ask you what was as shown by the books, the total amount invested in the stock of the company by its stockholders in cash whether through the intervention of engineers' certificates, cash stock directly or through bonds that were afterwards surrendered and stock issued in their stead?

A. The total amount?

Q. Yes.

A. $1,216,690.05

Q. The details of that are shown on page 1 of the exhibit you have prepared.

A. Page 3.

1959 Q. And the account of the bonds that were issued and returned for stock is found where?

A. Page 4 of this statement; pages 4 and 5 of this statement.

Q. What was the total issue of six per cent. bonds?

A. $75,400.

Q. What amount of those were sold at par, and what were sold for a discount?

A. In 1850 there were sold at par to the university $3,000; and for engineers' certificates at par $2,900. In 1851 $14,700 sold to the university at par and in 1852, $2,300 sold to the university at par.

Q. How were the balance sold?

A. The balance were sold at a discount.

Q. What was the total discount on the whole issue?

A. $7,292.

Q. Of the seven per cent bonds, were they sold at par or at a discount?

A. They were sold at a discount.

Q. How many of those were paid, or what was the discount.

A. The total discount was $64,730. on the $600,000 issued.

Q. How many of those were paid?

A. $50,000.

Q. If there were any number of them that were shown by the books to have been lost you may state how many there were?

A. There were $5,000 lost.

Q. What was the discount on the $50,000 of the bonds that were paid and the $5,000 that were lost?

1960 A. $5,933.58.

Q. What was the discount on the $545,000 that were surrendered and stock taken in lieu of them?

A. $58,796.42.

Q. Now, Mr. Cleland I wish you would tell year by year what amount of money was invested in the stock of this company by its stockholders and in that will you give the details of how the investment was made, whether for cash or engineers' certificates, or on bonds returned, or in what manner?

A. In 1847 there was cash $2,411;
In 1848 there was cash $5,185;
In 1849 there was cash $31,117.39;
Engineers' certificates, $20,872.61, making a total for 1849 of $51,990;

In 1850 there was cash	$64,667.39
Engineers' certificates	23,169.73
Vigo County bonds	50,000.00
Bonds surrendered for stock	10,591.59
Total for 1850	148,428.71
1851, cash	104,418.93
Engineers' certificates	38,935.97
Bonds surrendered for stock	30,110.91
Total for 1851	173,465.81
1852, cash	$210,431.74
Engineers' certificates	13,285.75
Paid Hadley for building depot	569.00

Nelson for right of way	200.00
Bonds surrendered	1,053.32
Total for 1852	225,509.81
1853, cash	$62,770.31
Engineers' certificates	821.23
Buchanan for right or way	50.00
Total for 1853	63,642.14
1854, cash	$40,104.00
Bonds surrendered	128,464.80
Total for 1854	168,568.80
1855, cash	$16,350.00
Fairbanks on scales	350.00
Bonds surrendered	30,331.97
Total for 1855	47,031.97
1856, cash	$3,050.00
Bonds surrendered	105,269.77
Total for 1856	108,319.77
1857, bonds surrendered	$48,174.30
1858, bonds	13,381.75

Mr. WILLIAMS: Surrendered?

The WITNESS: Yes these are all moneys received for bonds surrendered.

Q. I call your attention to the exhibit; I suppose you have the same there in 1856; what was the number of the seven per cent. bonds that were surrendered that year, that is the amount?

A. $34,000.

Q. In 1856?

1962 A. In 1856 there was $11,800.

Q. Is that the correct amount?

A. I don't think so.

Q. Shouldn't it be $118,000?

A. That's right sir.

Mr. KETCHAM: You may make that change in ink on the exhibit.

(The witness makes the change in the figures on the exhibit, as requested)

A. (Continuing:)

1859, bonds	$4,460.58
1862, bonds	52,634.88

These are all bonds surrendered, for stock.

1863, bonds surrendered	68,692.98
1864, bonds surrendered	5,352.70
1865, bonds surrendered	24,979.27
1866, bonds surrendered	4,460.58
Making a total of	1,216,690.05

Q. Now, Mr. Cleland, without going further into the details of this exhibit, it explains in detail the dates of the sales of the bonds, the amount received for them and the dates when they were surrendered, and the history of the stock transactions?

A. Yes sir.

Q. And this statement I will ask you whether it does or does not truthfully and accurately represent the amount of cash that
1963 was invested by the stockholders from the beginning to January 17th, 1873, and all the cash invested by the stockholders between those periods?

A. I think it does, all the cash.

Q. And whether it was directly for stock or indirectly through certificates or bonds surrendered?

A. Yes sir.

Q. Have you prepared a typewritten statement of this exhibit, Mr. Cleland?

A. I have, yes sir.

Q. I wish you would pass it to the reporter and let him identify it as Exhibit 54—A.

A. I will do so.

Mr. KETCHAM: I want it to follow Exhibit 54.

The MASTER: It is an amendment of the others?

Mr. KETCHAM: It is a great deal more explicit and it corrects in some respects the other. I will ask him about that.

The statement produced by the witness is now marked by the reporter for identification, Exhibit No. 54—A, November 3, 1899, R. Evans, rep."

Q. In investigating Exhibit 54, Mr. Cleland, I will ask you to state whether or not it was ascertained that there were some discrepancies in the amounts?

A. Yes, we found in one or two places that we could not figure it exactly and we made a new one in place of this Exhibit 54.
1964 *A.* And this as made now, correctly represents the showing upon the books with reference to everything that is set forth in the exhibit.

A. Yes sir.

Mr. KETCHAM: I now offer it in evidence.

The said statement being Exhibit No. 54—A, was marked by the reporter, "Exhibit No. 54—A, November 3, 1899, R. Evans, rep.," is admitted in evidence the same being in the words and figures following, to-wit:

(See next page.)

1965 (EXHIBIT No. 54 A.)

Recapitulation of "Stock Account," as Detailed in Statement No. 39, Exhibit 11.

1966 Recapitulation of "stock account," as detailed in statement No. 39, Exhibit No. 11, showing total stock issue and aggregate amount invested in same by stockholders.

Total stock issue			$1,988,150.00
Deduct:			
20% stock dividend of Nov. 1856		$211,600.00	
25% " " Apr. 1864		376,700.00	
Stock issued to the company on bonds which had been paid		50,000.00	
Stock issued to the company on lost bonds		5,000 00	
Stock issued to John Rose for services August 1852		10 000 00	
Stock issued to C. Rose,—extra allowance April 1853.		6,000.00	
Stock issued on interest certificates for interest allowed on advanced payments		28,746.02	
Discount on stock sold, Ex. 11	16,475.00		
" " sold, Exhibit 13	1,625.00		
		18,100.00	
Interest allowed John Rose on advanced payments, J. "A," p. 64		253.33	
Discount on $45,100 6 % bonds surrendered for stock.		6,264.18	
Disc't on $545,000 7 % bonds surrendered for stock		58,796.42	
			771,459.95
Balance			$1,216,690.05
1967 6% bonds issued	$75,400.00		
Sold at par (Eng. certif. & cash)	22,900.00		
Sold at discount	52,500.00		
Loss on same 10.058%	7,292.00		
Net proceeds on same	45,208.00		
Of bonds sold at discount, to wit		$52,500 00	
There were paid off at par		7,400.00	
And surrendered for stock		45,100.00	
On which the percentage of loss (13.89 %) amounts to.		6,264.18	
Leaving invested in stock			38,835.82
Bonds sold at par as above			2,900.00
			$41,735.82
7% bonds issued	600,000.00		
Disc't on same (10.79%)	64,730 00		
Net receipts	535,270.00		
Of the above $600,000 of bonds $50,000 were paid and $5000 were lost—for which $55,000 stock was issued to the company, leaving surrendered for stock		545,000.00	
On which the percentage of discount is		58,796.42	
Leaving invested in stock			486,203.58
Cash received for stock sold, as per Exhibit 11, p 18		$542,120.76	
Less discount—See Exhibit 13, p. 4—note		1,625 00	
			540,495.76

1968	Vigo County bonds	50,000.00
	Hadley for building depot	569.00
	Nelson for right of way	200.00
	Buchanan for right of way	50.00
	Fairbanks, bal. on scales	350.00
	Engineer's certificates paid in stock	97,085.89
		$1,216,690.05

Stock issued for cash received, viz:

1847–48.	For '47	$2,411.00		
	" '48	5,185.00		
				7,596.00
1849.	Stock issued for cash rec'd	31,117.39		
	" " engineer's certificates	20,872.61		
				51,990.00
1850.	" for cash rec'd	64,667.39		
	" " engineer's certificates	23,169.73		
	" " Vigo Co. bonds	50,000.00		
	" " 12,300 bonds surrendered for stock	10,591.59		
				148,428.71
1851.	Stock issued for cash rec'd	104,418.93		
	" " engineer's certificates	38,935.97		
	" " 34,500 6 % bonds surrendered for stock, viz., 2900 at $2,900 par, And 31,600 at dis. 27,210.91	30,110.91		
				173,465.81
1969				
1852.	Stock issued for cash received	$210,421.74		
	" " engineer's certificates	13,285.75		
	" " Hadley for building depot	569.00		
	" " Nelson for right of way	200.00		
	" " 1200 bonds	1,033.32		
				225,509.81
1853.	Stock issued for cash rec'd	62,770.31		
	" " engineer's certificates	821.83		
	" " Buchanan, right of way	50.00		
				63,642.14
1854.	Stock issued for cash rec'd	40,104.00		
	" " 144 M 7 % bonds sold	128,464.80		
				168,568.80
1855.	Stock issued for cash rec'd	16,350.00		
	" Fairbanks on scales	350 00		
	" 34 M 7 % bonds sold	30,331.97		
				47,031.97
1856.	" for cash rec'd	3,050.00		
	" " 118,000 7 % bonds sold at	105,269.77		
				108,319.77
1970				
1857.	Stock issued for 54 M 7 % bonds sold for			$48,174.30
1858.	" " 15 " " " "			13,381.75
1859.	" " 5 " " " "			4,460.58
1862.	" " 59 " " " "			52,634.88
1863.	" " 77 " " " "			68,692.98
1864.	" " 6 " " " "			5,352.70
1865.	" " 28 " " " "			24,979.27
1866.	" " 5 " " " "			4,460.58
	Total			$1,216,690.05

1971

I.

Note.

History of six per cent. bonds		$75,400.00
a. In 1850, $48,600 bonds sold for		42,669.17
Viz: $3,000.00 to Asbury university at par	$3,000.00	
2,900.00 for eng. cert. at par	2,900.00	
42,700 at a discount	36,769.17	
b. In 1851, $24,200 bonds sold for		22,800.50
Viz: $14,700 at par to Asbury university	14,700.00	
9,500 at a discount	8,180.50	
c. In 1852, $2,600 bonds sold for		2,558.33
Viz: $2,300 to Asbury univ'r'y	2,300.00	
300 at a discount	258.33	
On the whole issue the discount was $7,292.00: $20,000.00 was sold at par to Asbury univ. 2,900.00 was taken at par on engineer's certificates, leaving $52,500 sold at a discount of $7,292.00. Of this $52,500, $7,400.00 was paid in cash and $45,100.00 was surrendered for stock; the discount on these two amounts was respectively $1,027.82 and 6,264.18	7,292.00	

1972

II.

History of seven per cent. bonds		$600,000.00
a. In 1851, $250,000 of bonds were sold for		220,270.00
b. In 1852, $250,000 of bonds were sold for		315,000.00
Making a total discount of		$64,730.00
c. Of these bonds $50,000 were paid and $5000 lost; on these latter the *pro rata* of the discount was	$5,933.58	
And on the remainder $545,000 the *pro rata* discount was	58,796.42	
Total discount	$64,730.00	
d. Of these 545 M bonds sold at		486,203.58

There was surrendered for stock:

In 1854—144,000	that had sold for		128,464.80
" 1855— 34,000	"	"	30,331.97
" 1856—118,000	"	"	105,269.77
" 1857— 54,000	"	"	48,174.30
" 1858— 15,000	"	"	13,381.75
" 1859— 5,000	"	"	4,460.58
" 1862— 59,000	"	"	52,634.88
" 1863— 77,000.00	"	"	68,692.98
" 1864— 6,000	"	"	5,352.70
" 1865— 28,000	"	"	24,979.27
" 1866— 5,000	"	"	4,460.58
545,000			$486,203.58

1973 Q. Now, Mr. Cleland, I wish you would get Exhibit No. 44 and take your pencil and we will do some blackboard business ourselves. Turn to page 20 of Exhibit 44. Is that the page on which is a summary of dividends?

A. Summary of the cash dividends, yes, sir.

Q. The stock dividends are on page 23, I believe?

A. Yes sir.

Q. What was the first dividend that was paid by this road? What was the date of it?

A. January, 1853.

Q. Now I wish you would turn to page 3 of Exhibit 54—A and set down the amounts invested by the stockholders in cash for the various years as I will give them to you. What was the amount invested in 1847?

A. $2,411.

Q. Set that down and put ten per cent. interest to it for one year; put down the interest separately. What was the cash investment in 1848?

A. $5,185.

Q. The total investment therefore in 1847 and 1848?

A. $7,596.

Q. Under the head of interest put ten per cent. interest on that amount. What was the total investment in 1849?

A. In 1849 was $51,990.

Q. And at the end of 1849 the total investment?

A. $59,586.

Q. Set down ten per cent. interest on that amount.

A. Yes sir.

Q. Add the total investment in 1850, $148,428.71?

1974 A. $208,014.71

Q. Put the interest down there in the interest column. Put down $173,465.81, being the amount for 1851.

A. It makes a total of $381,480.52

Q. Put down the interest on that at ten per cent.

A. $38,148.05

Q. Take the amount for 1852, $225,509.81, and what was the total at the end of 1852?

A. $606,990.35

Q. Add the interest.

A. $60,699.03

Q. Now turn to page 20 of Exhibit 44. Ther- was a dividend paid in January of 1853 of how much?

A. Two dividends paid in 1853.

Q. In January of 1853, I mean.

A. $25,294.24

Q. How much of the interest that you have set down, if any, will that $25,000 equal and for what year?

A. I don't know whether I understand your question or not.

Q. Have you got the difference up to 1852, Mr. Cleland.

A. I have the total.

Q. The total and the interest; set down the interest on that; have you got that?
A. I have the total of the interest.
Q. What was the interest of the investment for 1847?
A. $241.10
Q. And for 1848?
A. $759.60
Q. And for 1849?
A. $5,958.60
Q. Will you add those?
1975 A. $6,959.30
Q. Now what was the next interest?
A. $20,801.47
Q. I wish you would set down the amount of the first dividend in January, 1853, $25,294.24 and deduct from that the interest up to and including the year 1849, and what will be your balance, of dividends after paying that amount of interest?
A. $18,334.94
Q. Now take your next dividend in July 1853. $25,710.49; add that to the unused portion of the first dividend and what amount have you?
A. $44,045.43
Q. Deduct from that the interest up to the end of the year 1853 and what will it be?
A. That leaves $23,243.96
Q. What is the interest first?
A. $20,801.47 and deducted it leaves $23,243.96
Q. What is the interest for the next year?
A. $38,148.05
Q That is the year 1852. Now I wish you would set down the amount invested in 1853, $63,542.14?
A. $670,632.47
Q. Take the interest at ten per cent. on it and what is the amount?
A. Interest $67,063.25
Q. Set down the amount invested in 1854—$160,568.80?
A. That makes $839,201.27
Q. Set down the interest on that at the rate of ten per cent. for a year.
A. $83,920.13
1976 Q. Now what installments of interest have you that haven't been deducted? What is the first installment. What is the amount of it?
A. That has not been deducted?
Q. Yes.
A. $38,148.05
Q. Set down the two dividends for the year, $29,546 and $44,655.
A. That added to what I have makes $97,444.96
Q. Now what are the installments of interest that are still unprovided for?

A. Everything from 1851 down as far as I have got.
Q. What is the installment for 1851?
A. $38,148.05
Q. Deduct that from the sum of those dividends and what amount have you remaining?
A. $59,296.91
Q. What was the interest for 1852?
A. $60,699.03
Q. Set down the amount invested for 1855, $47,031.97?
A. $886,233.24
Q. Carry the interest over.
A. $88,623.32
Q. Now take the dividend for 1855, $46,205, and $47,440, add them to the remainder that you had a moment ago and tell us what the amount will be.
A. $152,941.91
Q. Now what was the last installment of interest that was not provided for, what was the amount of it?
A. $60,669.03
Q. Take the first, or of the next two items of interest, from the amount that you have and what do you make it?
1977 A. Taking out the two leaves $25,179.63
Q. Now, that pays the interest up to what year?
A. 1853
Q. Now set down the dividends in 1856, $48,740, and $49,542.50, $75,799.50, $4,970, and $211,600, that, with the balance that you had after applying on the last interest that you had will give us what?
A. I have the total; here; I had $25,179.63 and adding in these dividends you have given me makes $415,831.63
Q. Now we have provided for the interest up to 1853?
A. Yes sir.
Q. We are through 1853 ar-n't we?
A. Yes sir.
Q. Now then set down the interest for 1854 and 1855 and what do they amount to?
A. $172,543.45
Q. That is for 1854 and 1855?
A. That is to the end of 1854 and 1855.
Q. Now deduct that from the dividends declared and you have what left?
A. $243,288.17
Q. Now have I given you the investment in 1856?
A. No sir.
Q. The investment in 1856 was $108,319.77 what is the total amount of the investment at the end of 1856?
A. $994,553.01
Q. Now all the interest has been paid up to this time?
A. Yes sir.
Q. And you have how much left?
A. $243,288.18

Q. Now I wish you would go back a moment and tell me
1978 what was the investment during the years 1847, 1848, 1849 and 1850?
A. The total investment?
Q. Yes.
A. The total investment was $208,014.71
Q. Now will you deduct that from the residue of the dividends declared as you have stated it a moment ago?
A. $243,288.18
Q. And tell me what amount you have left?
A. $35,273.47
Q. Now what have you for the total, investment at the end of 1856?
A. $994,553.01
Q. Will you deduct from that the principal of the sum invested in 1847, 1848, 1849 and 1850?
A. $208,014.71
Q. Will you deduct that from the balance that you had?
A. $786,538.30
Q. Set down the interest on that for one year at ten per cent.
A. That is $78,653.83
Q. Will you set down the dividends declared in 1857, namely two dividends of $81,687.
A. $163,374.
Q. From this deduct the interest at ten per cent. that you have just given on the balance due in 1856.
A. $84,720.17
Q. To the principal add the amount invested in 1857, namely, $48,174.30?
A. $834,712.60
Q. Take the ten per cent. interest on that?
1979 A. The interest is $83,471.26
Q. What is the balance that you had for the dividends?
A. $84,720.17
Q. Is there enough dividends there to pay it?
A. Yes sir.
Q. Will you deduct this interest from the remaining amount that you have for the dividends of 1857, Mr. Cleland, in the previous deduction that you have made did you include with the dividends in 1857, two dividends of $81,687. the balance that you had remaining before that time?
A. No sir.
Q. Well, I wish you would do so.
A. Well, I thought that ought to be in.
Q. Now what have you for the balance?
A. $198,647.47; that is the balance of the dividends of 1857.
Q. Now, Mr. Cleland, after these deductions what amount have you remaining?
A. $119,993.64

Q. Have you deducted now the interest for 1857, ten per cent. interest for 1857?

A. Yes sir.

Q. What is the amount that you would have if you had not deducted the interest of 1857?

A. $198,647.47

Q. Then before deducting the interest for 1857 from the amount that you had of $198,647.47, I wish you would deduct the amount of the investment in 1851 $173,465.81 and what will you have left?

A. $25,181.66.

1980 Q. We have thus, so far, provided for all the interest up to and including 1856?

A. Yes.

Q. And we have provided for the principal up to and including 1851?

A. Yes sir.

Q. Now from the principal that you have before adding that last ten per cent. interest will you deduct the amount of $173,465.81 and tell me what the balance is?

A. $661,246.79

Q. To that will you set down ten per cent. interest on that amount?

A. $66,124.68

Q. Now, what balance have you after taking out the investment in 1851?

A. $25,181.66

Q. To that will you add the dividends for the year 1858, two dividends of $68,822.50?

A. $162,826.66

Q. What amount of interest unprovided for have you, Mr. Cleland?

A. $78,653.83 in 1857; $83,471.26; and $66,124.68.

Q. Have you added the dividends in 1858 to the sum you had remaining before that time?

A. Yes sir.

Q. That gives how much?

A. $162,826.66

Q. Is that sufficient to pay the two installments of interest that you speak of?

A. Yes sir.

Q. If so, will you deduct it from them?

1981 A. That leaves $18,048.15

Q. Now, does that provide for all the interest up to and including the interest on the amount invested in the year 1858? No, I haven't given you the amount for 1858. Have I given you the investment in 1858, $13,381.75?

A. Not yet.

Q. Now add to the principal that you have remaining unpaid

$13,381.75, being the amount invested during that year 1858 and what amount have you as a principal?

A. $674,628.54

Q. To the amount you had remaining after using the dividends in 1858 will you add $68,822.50 and $69,072.50, the dividends for 1859, and give me the sum of the three amounts?

A. $153.943.15

Q. Now from this will you deduct the interest for the year 1853 and give me the balance?

A. $88,480.30

Q. Now to the principal that you have remaining will you add $4,460.58, being the amount invested in the year 1858.

A. $679,089.12

Q. Set down ten per cent. interest on that sum.

A. $67,908.91

Q. Deduct this interest from the sum that you had as a balance of the dividends at the close of the year 1858.

A. $20,571.39

Q. To this will you add the dividend for the year 1860, two dividends of $69,072.50, and tell me what sum you have remaining?

1982 A. $158,716.39

Q. Now, Mr. Cleland, have you carried in the expenditures for the year 1859, $4,460.58 and the interest on that?

A. Yes sir; I have got that in and deducted the interest.

Mr. WINTER: That is for 1859?

The WITNESS: Yes sir.

Q. What is the interest on that amount?

A. $67,908.91

Q. Have you deducted that from the sum of the dividends for 1860?

A. Yes sir; I have deducted that.

Q. Have you given to the reporter what balance then remains?

A. $20,571.39

Q. Have you deducted, Mr. Cleland, heretofore from the principal, the principal invested in 1847 and 1848 $7,596, and for 1849 $51,990, for 1850 $144,428.71 and 1851 $173,465.91, have you deducted all that from the principal by applying the dividends to the payment of them?

A. Yes, it leaves the principal $679,069.12

Q. You have a principal left now of what?

A. $679,089.12

Q. That is at the end of 1858?

A. Yes sir.

Q. And you have used the dividends of 1860 and have a balance remaining of what?

A. Adding the dividends of 1860 to the balance I had $158,658.39

1983 Q. Have you deducted the interest on your $600,000 at ten per cent. for one year from that $158,658.39?

A. I deducted it from the previous balance.

Q. That has already been deducted?

A. Yes sir.

Q. Then you have a balance at the end of 1859 of what amount?

A. Of the principal?

Q. Yes.

A. $679,089.12

Q. Now, will you set down one year's interest on that?

A. I have already done that.

Q. Will you now set down ten per cent. interest on that amount?

A. I have got that down and got it deducted.

Q. That is the second time for 1860; now will you set down the dividends, two dividends of $69,072.50, for the year 1861 and add them to the amount that you had remaining and give me what the result will be?

A. $296,861.39

Q. From that will you deduct the one year's interest,—that will be up to the end of 1860 on the principal that you have,—and give us what the balance will be of the dividends?

A. $228,952.48

Q. From that will you deduct the amount invested in the year 1852, $225,509.81, and tell me what the balance is that you have on hand?

A. $3,442.67

Q. Now will you deduct also from that principal that you
1984 have remaining,—$225,509.81,—the amount invested for the year 1852 and tell me what amount of principal you have left?

A. $453,579.31

Q. This brings the dividends used down to the end of the year 1861 and the principal down to the end of the year 1860, does it not?

A. Yes sir.

Q. Now, will you set down the interest at ten per cent. upon that last principal and give me the amount?

A. $45,357.93

Q. That is the interest for 1851?

A. Yes.

Q. Now, will you set down the two dividends for 1862, $69,222.50 and $100,831.50, and tell me what the aggregate is?

A. $173,496.67

Q. That is including the balance?

A. Including the balance, $3,442.67

Q. Now, from this sum you will deduct the interest for the year 1862,—for the year 1861 but up to the end of the year 1862,—it is interest for the year 1861.

A. It leaves a balance of $128,138.74

Q. From that will you deduct the amount expended in the year 1853, $63,642.14?

A. It gives a balance of $64,496.60

Q. Will you also deduct from the principal that you have the amount invested in the year 1853, $63,642.14 and tell me what is the remainder of the principal?

A. $389,937.17

Q. To this will you add the amount invested for the year
1985 1862, and tell me what the principal will amount to then at the end of the year 1862?

A. $442,572.05

Q. That is including the fifty-two thousand dollars?

A. Yes sir.

Q. Will you set down the interest on that sum at 10 per cent.?

A. $44,257.20

Q. Now, will you set down the dividends for the year 1863, $92,254.63, and also $109,506.69, and tell me what the sum of these two dividends will be?

A. $266,257.92

Q. Will you add to that the balance of the dividends unused heretofore.

A. That includes it; that is the dividends of 1863 and the balance I have.

Q. From this will you deduct the 10 per cent. interest for 1862 from the amount invested at the end of 1862 and what sum will you have remaining?

A. $222.000.72

Q. From this will you deduct the amount invested in the year 1854, $168.568.80 and give me the balance?

A. $53,431.92

A. Will you deduct also this amount $168,568.80 from the principal that you had remaining and what amount will you have remaining?

A. $27,003.25

Q. To this will you add the amount expended in 1863, $68,692.98?

A. That gives $343,696.23

Q. What was the interest on that at 10 per cent. for a year?

A. $34,269.62

1986 Q. That brings us now up to the end of the year 1863 as to principal and interest for one year thereafter. Now will you set down the dividends for the year 1864, namely, $129,244.71, $200,015.78 $3.912.50, and $376,700. and what including the balance that you had will be the subtrahend—what will be the sum of the dividends up to that time?

A. $763,394.91

Q. From this will you please deduct the interest for the year 1864 at 10 per cent. as you have heretofore set down on the principal due and unpaid?

A. $729,035.29

Q. From this will you deduct the amount expended in 1855, $47,031.97, and give me the result?

A. $682,003.32

Q. Add to that amount invested in 1864, $5,352.70

A. $687,336.02

Q. You don't want to add that to the $682,003.32; it is to be added to the principal sum invested. Have you deducted the forty-seven thousand dollars?

A. I have deducted the forty-seven thousand dollars from the dividends.

Mr. WINTER: He deducted it from the principal.

Q. You deducted that from the dividends? Have you deducted that from the principal?

A. No sir.

Q. Well, deduct it from the principal and let me know what you have for principal left?

A. $295,664.26

1987 Q. Now, that is the principal up to the end of the year 1864, as I understand. Now, will you deduct from unused dividends as you have heretofore given us the sum of $108,319.77, being the amount invested during the year 1856, and tell me what you will have left in the dividends?

A. $573,683.55

Q. Deduct that from the principal also and tell me what you have left of the principal?

A. $187,344.49

Q. Of principal?

A. Principal.

Q. And how much of dividends unused?

A. $573,683.55

Q. Now then from that remaining principal and also from these remaining dividends will you deduct please $44,178.30, being the amount invested in the year 1857 and give us the net amount of principal remaining outstanding and also the amount unused of the dividends?

A. The balance of principal is $139,170.19; the balance of the dividends is $525,509.25

Q. Now, will you set down at separate places the following amounts, namely; the amounts invested in 1858 $13,381.75; also the amount invested in 1859 $4,460.58; also $52,634.88, being the amount invested for the year 1862; also $68,692.88, being the amount invested for the year 1863; also $5,352.70, being the amount invested in the year 1864, and give me what these several items amount to?

A. $144,522.89

1988 Q. Now, will you deduct that sum from the principal remaining and also from the dividends that have not been used and tell us how much of principal you have outstanding?

A. There is not enough principal to take it from. The balance is the other way.

Q. Well, get it from the dividends; deduct it from the dividends.

A. It leaves the dividends $380,986.36

Q. Now what have you got of the principal? How do you stand with the principal?

A. I have $139,170.19

Q. And how much have you got to deduct?

A. $144,552.89

Q. Will you add to the principal that you had heretofore the sum of $5,352.70, being the amount invested in the year 1864?

A. It is $144,552.89

Q. And from that will you take off the sum of these amounts that I have given you and tell me what amount remains?

A. No balance; it is just even.

Q. Then at the end of the year 1864 the dividends equal the full amount invested and 10 per cent. interest per annum thereon as shown by this exhibit and the books and leaves a balance of dividends unused of how much?

A. $380,986.36

Q. Now will you set down the amount invested in the year 1865 $24,979.27 and $4,460.58, the latter being the amount during the year 1866 and what do they amount to?

1989 A. $29,439.85

Q. Will you now deduct that amount from the balance of dividends as you have given us heretofore and tell me what balance you have.

A. $351,546.51.

Q To that will you add the dividends declared in 1865, namely, $121,272.63 and $121,777.89; the dividends declared in 1866, $122,093.68 and $125,251.55; and the dividends declared in 1867, $125,251.55 and $167,002.15; and tell me what the sum will amount to?

A. $1,134,195.96

Q. Now will you tell me what 15 per cent. on $1,216,690.05 is?

A. $182,503.51

Q. Will you deduct that from the amount of the balance of the dividends as you have heretofore given it, including the year 1867?

A. The balance is $951,692.46

Q. To this will you add the dividends declared for the year 1868, namely, $123,567.35 and a second one of $125,567.35; there are two dividends of the same amount; and give me the result?

A. $1,202,827.16

Q. From this will you deduct the 15 per cent. of $1,216,690.05 as you have heretofore given and give me the result?

A. $1,020,323.66

Q. To this will you add the dividends declared in 1869, namely two dividends of $125,567.35 each, and give me the result?

A. $1,271,458.36

1990 Q. From this will you deduct the 15 per cent. on the $1,216,690.05

A. $1,088,954 86

Q. To this will you please add the dividends for the year 1870 one dividend of $125,557.35 and one for $122,347.69 and give me the result?

A. $1,336,866.90

Q. From this will you please deduct 15 per cent. on $1,216,690.05 and give me the result?

A. $1,154,366.40

Q. To this will you please add the two dividends for the year 1871, namely, each being for $122,347.69?

A. $1,399,061.78

Q. From this please deduct the 15 per cent. on the $1,216,690.05

A. It leaves a balance of $1,216,558.28

Q. To this please add the two dividends for the year 1872, namely two dividends of $119.289.

A. $1,455,136.28

Q. From this please deduct 15 per cent. on $1,216,690.05?

A. It leaves $1,272,632.78

Q. To this please add $29,822.25, being one fourth of the dividend declared for the six months ending in June 1873?

A. $1,302,455.03

Q. From this please deduct one eighth of 15 per cent. on $1,216,690.05 and give me the result?

A. $1,279,642.10

Q. It is true then, is it not, Mr. Cleland, after allowing interest at the rate of 10 per cent. per annum upon the full sum invested by the stockholders, as shown by this exhibit and by the books

1991 of the defendant company and after that full sum invested with 10 per cent. per annum interest had been returned by the dividends declared, and allowing dividends upon the full sum invested thereafter at the rate of 15 per cent. per annum there is a surplus of this sum that you have given of $1,279,642.10?

A. Yes, that is the way this comes out exactly.

Whereupon, the hour of four o'clock having arrived, the further hearing was adjourned until Monday morning November 6th, 1899, at ten o'clock a. m.

1992 NOVEMBER 6, 1899—9 o'clock a. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, Judge Robert S. Taylor, of counsel for plaintiff and Lawrence Maxwell, Esq., of counsel for defendant, being absent.

The examination in chief of JOHN CLELAND, a witness for the plaintiff, was resumed, as follows:

Questions by WILLIAM A. KETCHAM, Esq.:

Q. Now, Mr. Cleland, in your testimony on last Friday bringing down the total of the investment by the stockholders, either directly in cash or indirectly through bonds that had been surrendered and stock taken, at the end of the year 1863, including the amount for that year of $68,692.98, the interest had all been paid and the principal had been reduced until the amount was $342,696.23. I wish you would set down that amount.

A. I have done so.

Q. Upon the evidence given by Mr. Duy the other day from the ledger, the amount of cash on hand prior to the 6th of April, 1864, was $191,622.39. Set that down please, and give us the difference between the amount invested at the end of the year 1863 and the total cash on hand immediately prior to the declaration of
1993 the stock dividend on the 6th of April, 1864, and tell us what was the balance of the amount invested by the stockholders in the construction of the road, after deducting the cash on hand with the treasurer.

A. $151,073.84

Q. It is true therefore, is it not, as shown by Exhibit No. 54–A, and the books of the company that at the time of the declaration of the stock dividend on the 6th of April, 1864, the whole amount invested by the stockholders had been returned together with interest at the rate of 10 per cent. per annum, except $342,696.23?

A. Yes.

Q. And that there was then on hand in money sufficient to have reduced the entire amount immediately prior to the declaration of the stock dividend of April 6th, 1864 to $151,073.84

A. Yes sir.

Mr. KETCHAM: Now, I will pass that branch for the present and resume the re-examination of Mr. Duy.

1994 The re-examination of the witness GEORGE C. DUY was resumed as follows:

Questions by Mr. KETCHAM:

Q. Mr. Duy, I wish you would take Exhibit No. 54–A, please.

Mr. KETCHAM: Mr. Williams, do you want both of those exhibits, Exhibit No. 54 and Exhibit No. 54–A, in? If not, I want to substitute the one for the other.

Mr. WILLIAMS: I would rather they both stay in until we look at them. I have not compared them.

Q. Mr. Duy, on the cross-examination by Mr. Williams, after setting down upon an analysis of Exhibit 22, you have heretofore answered him that the item of net earnings during the year 1851 was $1,561.58. I wish you would turn to Exhibit No. 54–A, and set down in one column the total amount investment in the construction of the road by the stockholders for the several years, as appears, and the interest thereon at the rate of ten per cent. per annum for each year.

For 1847, $2,411; for 1848 $5,185; that makes the total for the two years $7,586. Will you set down the interest?

A. Yes sir.

Q. Now, assuming that the total net earnings for the year
1995 1851 were as you have stated, upon Mr. Williams' theory, $1,561.58, and deducting from that the interest for the years 1847 and 1848 at ten per cent., what would you have of a balance unexpended of the net earnings for that year—the year 1851.

A. The total interest for the years 1847 and 1848 is $1,000.70.

Mr. WINTER: How do you get that?

Mr. KETCHAM: The interest for 1847 is $241.10, and the interest for 1848 is $759.60, and the total is $1,000.70

The WITNESS: Deducting $1,000.70 from $1,561.58, the earnings, leaves a balance of $560.88.

Q. Now, the investment for the year 1849 being as shown by Exhibit 54–A, $51,990., I wish you would add that to the previous investment, and set down the amount of the interest at ten per cent and give us the total investment at the end of 1849 and the unreturned interest.

A. The total investment is $59,586. Interest on that for one year is $5,958.60—on the total investment for one year.

Q. Now, I wish you would to the amount invested add the investment for the year 1850, $148,428.71, and give us the result showing the total amount invested at the end of 1850.

A. $208,014.71

Q. And the interest for that for one year would be how much?

A. $2,080 47

1996 Q. And what would be the total amount of unreturned interest up to the close of the year 1851?

A. I have only given you earnings for 1850.

Q. I want ten per cent. interest on that.

A. That brings it to the close of the year 1851, $26,670.07

Q. Now, to the unexpended earnings that you had, after deducting the interest for the years 1847 and 1848, will you add $45,860.05, the amount of the net earnings for the year 1852, as stated in your answer to Mr. Williams, upon his theory of the net earnings, and give us the result?

A. $46,420.93

Q. From this amount will you take the sum of the interest on the investment for the year 1849 and 1850 and tell us what amount will remain?

A. $19,660.86

Q. So that at the expiration of the year 1852 there had been returned the amount of the net earnings as you answered Mr. Williams, had returned the interest at the rate of ten per cent. per annum on the amount invested for 1847, 1848, 1849 and 1850, and left a balance of how much?

A. $19,660.86

Q. Now, to the amount invested will you add the total amount invested for the year 1851, $173,465.81, and give us the total sum invested at the end of the year 1851.

Mr. WILLIAMS: All of these inquiries, Mr. Ketcham, about the sum invested, refer to that sum as shown by Exhibit No. 54 A?

1997 Mr. KETCHAM: Yes sir, Exhibit No. 54 A.

A. $381,480.52

Q. Upon which interest at the rate of ten per cent. per annum was what?

A. $38,148.05

Q. Now, will you set down the amount of $225,509.81, being the amount invested as shown by Exhibit 54 A for the year 1852?

A. Well.

Q. And tell us what was the amount invested, according to that statement, at the expiration of the year 1852?

A. $606,990 33

Q. And the interest at ten per cent. for a year, will you set that down?

A. $60,999.03

Q. To the amount of nineteen thousand and odd dollars that you had remaining after deducting the interest upon the amount invested for the years up to and including the year 1851 will you add $63,395.71, being the amount of net earnings for the year 1853 as you have heretofore answered to Mr. Williams upon an examination of Exhibit No. 22?

A. $83,056.57

Q. Now, what have you as the interest up to the end of the year 1852?

A. $38,145.05

Q. Will you deduct that amount from the eighty-three thousand and odd dollars and give us what amount you have remaining?

A. $44,908.52

1998 Q. Now, to the investment made up to the year 1852, the total investment up to the year 1852, will you add the amount invested during the year 1853 as shown by Exhibit 54 A, namely, $63,642.14.

A. $670,632 47

Q. And set down the interest on that amount at ten per cent. for one year.

A. $67,063.25

Q. To the unexpended balance of the earnings that you have heretofore given us will you add the total net earnings for the year 1854 as you have heretofore given them to Mr. Williams upon his cross-examination, namely $114,537.55, and give us the result?

A. $159,446.07

Q. What amount of interest have you as yet uncared for?

A. $127,762.28

Q. Will you deduct that from the balance of the net earnings as you have just answered and tell us what remains?

A. $31,683.79

Q. So that at the end of 1854 all of the interest upon the amount invested had been returned, had been provided for, and left a surplus from the earnings, as you have given them to Mr. Williams, of $31,683.79

A. Yes sir.

Q. To the amount invested up to the close of the year 1853 will you please to add the amount invested for the year 1854 as shown by Exhibit No. 54 A, namely, $168,568.80, and tell us what was
1999 the total of the amount invested up to the close of the year 1854?

A. $839,201.27.

Q. Will you set down the interest upon that amount for one year at the rate of ten per cent.?

A. $83,920.13

Q. To the balance that you had from the net receipts as you have answered to Mr. Williams, will you add the net receipts as shown by your answer to him upon your cross-examination, for the year 1855, namely, $148,327.32 and give us the balance of the net receipts?

A. $180,011.11

Q. From this amount will you please deduct the unreturned interest at ten per cent., eighty thousand dollars, and tell us what the residue is?

A. $96,090.98

Q. To the principal that you already have will you add the total amount invested as shown by Exhibit 54 A for the year 1855, $47,031.97

A. $886,233.24

Q Now, at the close of the year 1855, all of the interest upon the amount invested at the rate of ten per cent. per annum had been returned, and you have unexpended of the net earnings up to the end of the year 1855, the sum of $96,090.98

A. Yes sir.

Q. Will you deduct that sum of $96,090.98 from the sum of the amount invested, as shown by Exhibit 54 A, at the expiration of the year 1855, and tell us what was the total unreturned investment at the close of the year 1855?

A. $790,142.26

2000 Q. To this will you please—please set down the interest at ten per cent. per annum on this sum?

A. $79,014.23

Q. And will you add to the principal the amount invested for the year 1856, as shown by Exhibit No. 54 A, $108,319.97 and tell us what was the total amount invested at the expiration of the year, the total of the principal invested at the expiration of the year 1856?

A. $898,462.03

Q. Now, then, take the total net receipts for the year 1856 as you have answered to Mr. Williams upon his cross-examination, $342,393.81, and from that deduct the interest upon the investment for the year, including the year 1855, and tell us what the balance is.

A. The balance is $263,379.53 No, I have that wrong. The balance is $263,379.58, instead of fifty-three cents.

Q. Now, will you deduct that from the amount invested, the total amount invested at the end of the year 1856, as you have heretofore given it, and tell us what the balance of the principal, of the amount invested up to the close of the year 1856 will remain?

A. $635,082.45

Q. Will you set down now the ten per cent. interest upon that, being the interest for the year 1857 on the unpaid principal up to and including the year 1856 and give us what — amount will be?

A. $63,508 24

2001 Q. Will you take this amount, being the interest for 1857, from the net earnings for the year 1857 as you have heretofore answered to Mr. Williams, $182,873.05, and tell us what amount net earnings you will have remaining after paying the interest at the rate of ten per cent. per annum on the investment up to the close of the year 1857.

A. $119,364.81. I get the earnings for 1857, $182,873.05, and the interest to come off $63,508.24, which leaves a balance of earnings of $119,364.81.

Q. Now, what at the end of 1857 did you have as the total investment?

A. $683,256.75

Q. Was that after deducting the two hundred and six thousand dollars?

A. No sir.

Q. Will you take from that, this balance and tell us what was the total amount invested at the expiration of 1857 after deducting all of the net earnings—the balance of the net earnings up to and including the year 1857?

A. $563,891.94

Q. Will you set down interest on that for one year at ten per cent.?

A. $56,389.19

Q. Now, deduct that amount from the total net earnings for the year 1858, as you have answered heretofore to Mr. Williams, $161,144.54, and give us the balance of the net earnings for that year?

A. $104,755.35

Q. To the net amount invested at the close of the year 1857,
2002 will you please add the amount invested during the year 1858, as shown by Exhibit 54 A, $13,381.75

A. $577,273.69

Q. From this will you please deduct the balance of the net earnings as you have heretofore given them, net earnings for 1858, and tell us what remains?

A. $472.518.34

Q. And set down ten per cent. of that. What will that be?

A. $47,251.83

Q. Will you please deduct that amount from the net earnings for the year 1859 as you have heretofore answered to Mr. Williams, $160,082.62

A. The balance is $112,830.79

Q. To the amount invested at the close of the year 1858 as you have heretofore answered, will you add the total amount invested during the year 1859 as shown by Exhibit No. 54 A, $4,460.58, and give us the total amount invested at the end of the year 1859.

A. $476,978.92

Q. From this will you please deduct the balance of the net earnings for the year 1859, as you have heretofore given us, $112,830.79, and tell us what the remainder will be?

A. $364,148.13

Q. Upon this amount will you set down the interest at the rate of ten per cent. for one year?

A. $36,414.81

Q. Now, will you deduct this amount from the net earnings for the year 1860 as you have heretofore answered to Mr. Wil-
2003 liams upon your cross-examination, $191,195.07, and tell us what the remainder will be.

A. $154,780.26

Q. Will you please deduct this amount from the balance of the amount invested, as you have heretofore answered, and tell us what at the close of 1860 was the total amount invested after applying the earnings as you have given them to Mr. Williams heretofore to the payment of the interest upon the investment at the rate of ten per cent. per annum, and so much of the principal as it would return.

A. The balance is $209,367.87

Q. Will you set down ten per cent. thereon?

A. $20,936.79

Q. And deducting that amount from the net earnings for the year 1861 as you have heretofore answered to Mr. Williams upon your cross-examination, namely, $181,439.99, tell us what the balance will be?

A. $160,503.20

Q. Will you please deduct that from the principal of the amount invested as you have heretofore explained.

A. $48,864.67 is the balance.

Q. And that represents, does it not, the balance of the principal

invested together with interest thereon at the rate of ten per cent. per annum as shown by Exhibit No. 54 A at the close of the year 1861 after crediting the net earnings as you have heretofore answered to Mr. Williams upon your cross-examination?

A. Yes sir.

Q. For the year 1862 I wish you would add the total amount invested as shown by Exhibit No. 54 A, $52,634.88 and tell me
2004 what at the expiration of the year 1862 was the total balance of the amount invested according to Exhibit No. 54 A?

A. $101,499.55

Q. Will you deduct this amount from the total net earnings for the year 1862 as you have heretofore answered to Mr. Williams upon your cross-examination, $316,379.21

A. The balance is $214,879.66

Q. It is true then, is it not, according to Exhibit No. 54 A, that at the end of the year 1862 the net earnings as you have heretofore given them in your cross-examination to Mr. Williams, have amounted to $214,879.66 in excess of the total amount invested up to and including the year 1862, together with interest at the rate of ten per cent. per annum.

A. I think we have omitted to add the interest for the year 1861 on $48,864.67 balance of principal at the end of 1861.

Q. At the end of 1861 what was the total investment?

A. At the end of 1861, after deducting the earnings of 1861 less the interest, the balance was $48,864.67

Q. Now, the interest on that $48,864.67, the ten per cent. interest on that you have not taken into account.

A. No sir, you did not call for that.

Q. If therefore, you deduct the amount of the interest on $4,886.47, being the interest at ten per cent. on $48,864.70, the balance that you have will be correct, will it?

A. If I deduct that $4,886.47 from the balance of earnings heretofore given, the correct balance is $209,993.19

2005 Q. Now, at the end of 1862, the total amount invested with the interest thereon had been returned, and there was a balance of net earnings of how much?

A. $209,993.19

Q. From this will you please deduct the amount invested in the year 1863 as shown by Exhibit No. 54 A, $68,692.98, and tell us what balance you have—what the remainder is.

A. $141,300.21

Q. To this will you please add the earnings for the year 1863 as you have heretofore answered to Mr. Williams, on your cross-examination, $307,527.15

A. The total is $448,827.36

Q. And that represents at the close of the year 1863 the excess of the net earnings as you have heretofore answered to Mr. Williams over and above the amount invested with interest at the rate of ten per cent. per annum as shown by Exhibit 54 A?

A. I do not know that I understand you. At the end of 1862 there was a surplus earning of $209,993.19

Q. Yes.

A. From that I deducted the investment in 1863, $68,692.98. You have stopped adding in ten per cent. interest. Ought not fifteen per cent. on the total investment go on at the end of 1862?

Q. No sir, because there were further investment later.

A. All right. Then the balance of earnings we have is $448,827.36

Q. After returning the principal with interest at the rate of ten per cent. per annum upon the amount invested as shown by Exhibit 54 A.

2006 A. Yes sir.

Q. Now, when the stock dividend was made on the 6*h*t of April, 1864, did it not appear by the books that of the actual money that had been invested by the stockholders in the construction of the road either directly in the first instance in the purchase of the stock, or indirectly in the purchase of bonds that were afterwards surrendered for stock, the total amount of money invested by the stockholders had been returned to them with interest at the rate of ten per cent. per annum and left a balance of $448,000., or whatever that amount is, that had been earned during the various years as you have heretofore answered to Mr. Williams, and there was a balance of net earnings on hand of $448,827.36

A. Yes sir.

Q. Will you please set down the amount invested in the year 1864, $5,352.70 and $24,979.27 and $4,460.58; add those three amounts up and tell us what the sum will be.

A. Those are the investments for 1864, 1865 and 1866 as per Exhibit 54 A, and the total $34,792.55

Q. Now, to the balance of earnings that you have heretofore given at the end of 1863, $448,827.36, will you please add the net earnings as you have heretofore given them to Mr. Williams, upon your cross-examination, for 1864 $346,483.49, for 1865 $331,668.10 and for 1866 $292,938.78 and give us the same.

A. $1,419,917.73

2007 Q. From this will you deduct the sum of the investments as you have heretofore added them for the years 1864, 1865 and 1866 as shown by Exhibit 54 A, and tell us what remains.

A. $1,385,125.18

Q. Is it not true therefore that at the end of the year 1866 the total amount invested in the stock of this company whether directly for cash, for engineers' surveys, or Vigo County bonds or indirectly for bonds that were surrendered for stock, had been equalled together with ten per cent. interest per annum by the total net earnings as you have heretofore answered them to Mr. Williams, and left a surplus of $1,385,125.18 at the end of the year 1866.

A. That is true except that there has been no ten per cent. interest allowed on the investment for the last three or four years, I suppose upon the principle that the earnings have largely overpaid former investments and interest.

Q. Interest, in the computations you have heretofore made this morning, was added in every year at the rate of ten per cent., until the principle had been equalled by the earnings, and thereafter no ten per cent. had been added, and the fact is that the principle had up to the time when interest was not added been equalled or more than equalled by the earnings, the net earnings.

A. That is right, yes sir.

Q. Now, will you tell us what a dividend upon the total of $1,216,690.05 at the rate of fifteen per cent. would amount to.

A. $182,503.51

2008 Q. Do you recall as a matter of fact whether the net earnings as you have heretofore given them upon your cross-examination to Mr. Williams, during the year 1867 and any subsequent year fell short of this $182,503.51

A. No sir. I cannot recollect.

Q. I will call your attention to the testimony you have given upon the cross-examination, by Mr. Williams, and will you first set down $1,385,125.18 and to that sum will you please add the net earnings as you have heretofore given them in your answer to Mr. Williams upon his cross-examination as follows: For the year 1867, $409,615.42——

A. I want to suggest here that, as it was very evident that Mr. Williams wanted to get everything exactly right in his very careful cross-examination, that there were one or two years there where there was an item about which there was some doubt in our minds. For instance there was one year where there was $15,850 or $15,750 deducted from the transportation earnings on interest account. I think by that operation that was taken out twice, or else we ought to have on our earnings outside of transportation account credit for the credit items in the interest account.

Q. That I will come to later in the re-examination, Mr. Duy, but I am now proceeding upon the proposition as to what the final balance would be according to the theory of Mr. Williams, or according to Mr. Williams' cross-examination exactly as you gave it to him on the net earnings.

A. Yes sir.

2009 Q. Now, I have given you for the year 1867 $409,615.42; for the year 1868 $344,018.89; for the year 1869 $289,347.91; for the year 1870 $194,720.50; for the year 1871 $257,351.78; for the year 1872 $221,252.53 for one-eighth of the year 1873 $27,467.96; and give us the result.

A. $3,128,900.17

Q. As these amounts were set down you observed, did you not, that in each year, the account was in excess of the fifteen per cent. dividend $182,503.31.

A. Yes sir.

Q. Now, will you get down dividends at the rate of fifteen per cent. per annum on the total amount invested, $1,216,619.05 at the rate of fifteen per cent. for the years 1867, 1868, 1869, 1870, 1871

and 1872, six in all, and also one-eighth at the same rate for 1873, and tell us what that will amount to.

A. $1,117,834.04

Mr. WINTER: What do you make the fraction of the year 1873? I made it $22,612.93.

The WITNESS: Then the total would be $1,117,833.99. That is right.

Q. Will you please deduct that from the aggregate of the net earnings that you have heretofore given $3,138,900.17 and tell us the remainder?

A. $2,911,066.18

Q. Is it not true then, Mr. Duy, that the total net earnings from the year 1851 to January 17, 1873, taking the proporti-nate
2010 part for the year 1873, as you have heretofore given them to Mr. Williams, exceeds the total amount invested by the stockholders, as shown by Exhibit 54 A, together with interest thereon, at the rate of ten per cent. per annum up to the year 1866 when the last amount was invested and dividends at the rate of fifteen per cent. per annum on the full amount invested, $1.216.690.05 for each year from and after the year 1866, by the sum of $2.011,066.18.

A. That is true, if I have made no mistake in my figuring.

Q. The net earnings as you have given them to Mr. Williams upon his cross-examination at the close of the year 1866 exceeded the amount invested with interest thereon at the rate of ten per cent. per annum, did it not?

A. Yes sir.

Q. If, therefore, at any time, during the years subsequent to 1863, the net earnings should be found to have exceeded the amounts that you have answered to Mr. Williams upon his cross-examination, to the extent of that excess this final balance of $2,011,066.18 would be increased?

A. Yes sir.

Q. And to the extent that the net earnings as you have heretofore given them to Mr. Williams since the year 1863 would be diminished, by just that amount this balance of $2,011.066.18 be diminished, would it not?

A. Yes sir.

Q. And *of* the net earnings were increased or diminished
2011 by any amount prior to 1863, the aggregate result would not be arrived at by simply adding or deducting those net earnings, would it?

A. No sir.

Q. Because of the computations of ten per cent. added each year.

A. That is correct.

Q. Now, in the beginning of your cross-examination you answered to Mr. Williams that your exhibit showing the amount of the construction for the years 1850 and 1851, as they appeared upon Exhibit No. 3, did not correspond with the ledger; and Mr. Williams asked you to look up and see in what respect the difference was, and

thereafter never called for a further answer upon that subject. I will get you to state whether you did at his request look up the construction account as it appears on Exhibit No. 3, and the ledger, and state whether upon that investigation you ascertained whether they did or did not in fact correspond?

A. Well, it seems to me I did, but I cannot answer it now.

Q. If you are unable to answer that I wish you would take Exhibit No. 3——

Mr. WILLIAMS: I wish you would permit me, Mr. Ketcham, I will say I thought I had made that explanation fully in my detailed cross-examination; I thought I had explained that by showing that the only difference was in its growing out of the transfer from these separate accounts to the construction account on the ledger.

2012 Q. Mr. Duy, I wish you would get Exhibit No. 3, and take the ledger and see whether the exhibits you have heretofore given in evidence do or do not correspond with the ledger for the years 1850 and 1851.

Mr. WILLIAMS: I will also say that my recollection is that what I called his attention to was Exhibit No. 10, as to the distribution of the years on Exhibit No., 10 and not Exhibit No. 3.

A. In 1850, statement No. 3, does not compare with the ledger, just as I explained at the time we were going over it; the two items were posted in 1850 on the ledger, but were entered in the ledger presumably in 1851 because it was the date of January following the heading of the page, "1850," but afterwards they all came back.

Q. Then, if I understand you, Exhibit No. 3 and the ledger account did not agree because and to the extent that an entry which the journal showed was in fact made in 1851 was entered in the ledger in 1850.

A. Yes sir; as I took the journal to be, and as I explained in my cross-examination, Ledger A, page 48, is headed "Terre Haute, Indiana, 1850," and there follows an entry which has no connection with this construction account; immediately thereafter follows an entry in which the construction account is charged $3,104.05, part of this difference we are talking about, and that entry is dated
2013 January the 3rd, following immediately under the heading 1850—I take it to mean January 3rd 1851, and so entered it on our statement, or exhibit, while in the ledger it is posted under the date of December 1850; and the same is true as to the other item $1,540.39, which explains the difference between the exhibit and the face of the ledger.

Q. And that difference therefore was simply that while the journal showed the transactions to be in one year it appears to have been posted to the ledger in the other year.

A. Yes sir.

Q. And on your exhibits you have made it with reference to the year as it appears upon the journal.

A. Yes sir.

Q. Now, at page 234 of your cross-examination you state that the debit side of the ledger at the close of the year 1852, was $746,006.30 with a credit of $19,012.48, leaving a net balance of $726,993.82, whereas, upon your statement it is $990,929.36. Will you explain to the master what was the occasion of this difference between $726,993.82 and $990,929.36.

Pending the answer to this question, the hour of twelve o'clock and thirty minutes having arrived, the further hearing was adjourned until two o'clock p. m.

2014 NOVEMBER 5, 1899—Two o'clock p. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, Judge Robert S. Taylor, of counsel for plaintiff and Lawrence Maxwell, Esq., of counsel for defendant, being absent.

The re-examination of the witness GEORGE C. DUY, was resumed as follows:

Questions by WILLIAM A. KETCHAM, Esq.:

Q. Mr. Duy, at page 234 of your testimony, in your cross-examition by Mr. Williams, you answered that on your statement the balance in the construction account for the year 1852 was $990,929.36, while that on the ledger was $746,006.30, with credits of $19,012.48, leaving a balance of $726,993.82. Will you turn to the ledger at pages 63 and 91 and explain to the master how you got at those balances, and what are the balances as they appear upon the ledger—balances of construction—for the year 1852. You said it was $726,993.02 after deducting the $19,012.48, the original amount being $746,006.30.

A. Give me that nine hundred and ninety thousand again—what was that amount?

Q. $990,929.36. On Exhibit No. 3 what have you the balance at the commencement of 1852? Look at page 4.

A. I have $320,743.23

2015 Q. At the end of 1852 on page 4 of Exhibit 4.

A. $1,311,672.59

Q. What is the difference between the two?

A. $990,929.36

Q. That would represent then, would it not, as shown by Exhibits 3 and 4, the total of the net expenditure for the year 1852?

A. Yes sir.

Q. Now, will you turn to page 63 of the ledger and see with what figures, with what amount the ledger balance opens on the first of January, 1852?

A. $320,743.23, the same as I have it.

Q. Set that down. Now turn to page 91 of the ledger, and see how it appears to be December of 1852.

A. The balance is struck December 31st, 1852, and is $1,047,797.05

Q. Now, deduct from that the three hundred and twenty odd thousand with which you began the year and give us the balance.

A. $727,053.82

Q. That represents the amount that you answered on page 234 of the evidence, $726,993.82, but for a mistake in the footing of ten dollars, does it not?

A. No, it does not.

Q. What is on the ledger the actual balance that appears to commence the year of 1853 with?

A. That balance is carried down from December 31st to January 1st, $1,047,797.05

Q. Is that the only balance that you find on that book for the first of January?

A. No sir.

Q. If there is another balance there what is it?

2016 A. There is $1,311,672.59.

Q. You deduct from that the $320,000 with which the year began, and let us know what the difference is.

A. $990,929.36

Q. That is the same amount that on page 234 you mentioned as the result of your Exhibits 3 and 4?

A. Yes sir.

Q. Now, what is the explanation of the difference between the two amounts, the amount of those footings of the first of January, between the million and something and the million three hundred thousand and something?

A. $263,875.55

Q. Where does that come from?

A. That comes from the three entries, the three items entered on the debit side between the first and second balances that I have mentioned.

Q. On what date are they footed? Was that entry in the journal?

A. January 1st. Oh, the journal, I beg pardon.

Q. Yes, the journal.

A. December 31st, 1852.

Q. So that properly they would appear in the transactions of 1852?

A. Yes sir.

Q. And in that respect your Exhibits 3 and 4 do exactly correspond with the journal entries, taking the ledger entry which is made as of the first of January instead of the 31st of December.

A. Yes sir.

Q. Now, as to how you got the $726,993.82 in your answer

2017 at page 234 of the evidence, in lieu of $727,053.82, a difference of sixty dollars, are you able at this time to explain?

A. No sir.

Q. Well, between now and some other time, I wish you would see if you can get the explanation of it. Except then as to the inter-

mediate entry there in which there is a discrepancy of sixty dollars, your statements No. 3 and 4 do correspond with the statements on the ledger when you give to the ledger the date as it appears on the journal?

A. Yes sir.

Q. Now, take Exhibit No. 55. The item $231,125.56 on page 7. At page 250 of the evidence your attention is called to the amount of construction and equipment in 1872, and you say in answer to the question by Mr. Williams, that in 1871, there is a charge of $5,761.75. If you turn to page 6 you will see the two first items that aggregate $5,761.75 As a matter of fact however, it was at that time true, was it not, that they were going not by the calendar year, but by the fiscal year, which ends on the 30th of November?

A. Yes sir.

Q. And this amount therefore of $5,761.75 is properly entered in the fiscal year of 1872, is it not?

A. Yes sir.

Q. And as such is included in the balance $231,125.56 that goes to profit and loss?

A. Yes sir.

Q. On page 251 of the evidence you were asked in regard to an item of real estate $4,490.50, and you answered that you find
2018 no such amount in the real estate, and then stated that it was charged to construction and equipment. I will get you to look at Exhibit No. 55 again, and I will ask you if the $4,490.50 is not in "railroad cost of" at page 5 of Exhibit 55 instead of construction and equipment that is on pages 6 and 7.

Mr. WILLIAMS: He told me afterwards he found it, in that same examination.

A. In point of fact it is in both places, "railroad cost of" and "construction and equipment." There is a charge to "road cost of" in one item, $207,087.30 and that comes from construction and equipment account, which was $231,125.56, less the sum of $24,038.26. That real estate item of $4,400 and something must be included in that $207.000, though in construction and equipment account it is not itemized as real estate.

Q. In the construction and equipment account there is a balance transferred to "railroad cost of" of $207,087.30.

A. Yes.

Q. On "railroad cost of" there is a distribution of this amount of $207,087.30, in which you find real estate $4,490.50?

A. Yes sir.

Q. And as that comes from construction and equipment account, it must necessarily be in some of the combinations in the total of construction *of construction* and equipment.

A. Yes sir, it must be there.

2019 Q. But it finally rests in "railroad cost of" on page 5 of Exhibit 55?

A. Yes sir.

Q. Now, I wish you would turn to Exhibit 55 and give me the details for the year 1869 of the expenditure for double track, equipment and extension. You have given it here, the aggregate amount, as $225,291.27 What was there for that year 1869 for construction of double track? Turn to page one.

A. $17,884.41

Q. What have you in that year 1869 for equipment—anything?

A. No sir.

Q. What have you for extension?

A. $207,406.86

Q. Now, on pages 308 and 309 of the evidence, you give the items of double track, equipment and extension as $385,690.34. Will you give it to me in detail; how much for double track and how much for equipment and how much for extension?

A. Double track, $7,190.94; equipment, $179,020.45; extension, $240,339.57

Q. That makes a total of four hundred and twenty-six thousand instead of three hundred and eighty-five thousand. What are those items less the credit?

A. The equipment should be $175,182.75

Q. The extension should be what? Should not that equipment account instead of being either one hundred and seventy-five thousand or anything else, ought it not be one hundred and thirty-eight thousand one hundred and thirty-nine dollars and eighty-three cents?

2020 A. That is correct.

Q. Now what is the amount?

A. $385,690.34

Q. Now, taking Exhibit No. 55, what have you there for the total expense of double track on that exhibit?

A. $35,075.35

Q. What have you for the total expense of equipment?

A. $138,139.83

Q. What for extensions?

A. $448,360.71

Q. For construction and equipment, the balance of the construction and equipment account.

A. The balance of it is $231,125.56. All that $207,087.30 went into "road cost of."

Q. Now, will you set down these four items, $25,075.35, $138,139.83, $448,860.71, $207,087.30, and tell us what they amount to.

A. $819,163.19

Q. Now, can you tell us from any exhibit, and if so what exhibit, what was the proceeds of the $800,000 bonds that was ordered to be issued by the entry on the records that was introduced the other day.

A. The entire proceeds of the sale of the eight hundred thousand dollars of bonds issued in 1869, was $735,540.

Q. Now, so far as the books of this company disclose on the 17th of January, 1873, when they went under the general railroad law,

that $800,000 bonded indebtedness was still outstanding, was it not?

A. Yes sir.

Q. Now, if you should deduct from those items of double
2021 track, extension, construction and equipment, that you have given, the aggregate of as $819,163.19, the proceeds of the bonds $735,540, what amount of those expenditures made on account of construction and equipment and extension and double track, is there that was paid other than out of the proceeds of those bonds?

A. The difference between the two is $83,623.19.

Q. Which exceeds the other—the cost of construction?

A. The cost of the construction exceeds the proceeds of the bonds by that amount, $83,623.19.

Q. How much did the proceeds of the bonds exceed the cost of double track and of the extension?

A. $261,603.94

Q. Is that right?

A. I think so.

Q. The proceeds of the bonds was what?

A. $735,540.

Q. Extension was what?

A. $448,860.71

Q. And the double track was what?

A. $25,075.35

Q. Was there anything on the record to show what disposition was made of this $261,304.94 received from the sale of bonds other than the general entries on the books that you have heretofore detailed

A. That sum should be $261,603.94

Q. That is my mistake.

Q. On page 6 of the printed reports for the year ending November
30, 1869 after describing a proposed work on the extension the report says, "To enable the company to procure means to make
2022 the extension above named, construct branches and double track, it was deemed advisable to issue bonds of the company. An order was accordingly made authorizing an issue of eight hundred thousand dollars, payable in ten years, bearing seven per cent. interest, principal and interest payable at the Farmers' Loan and Trust Company in the city of New York. Of these bonds three hundred and forty-eight thousand dollars have been disposed of at fair rates, and it is now found that the sale of two hundred and fifty-two thousand dollars additional will furnish means sufficient to meet the wants of the company—thus making the bonded debt but six hundred thousand dollars." In the report of the year ending November 30th, 1870, on page 5, I find a paragraph as follows: "In consequence of the large amounts expended for equipment and building of branches as above stated"—I think I had better read above that. "The extension of your road to the Illinois State line, to connect with the St. Louis, Vandalia & Terre Haute railroad was completed in May, and the total cost of such extension, including

the iron bridge over the Wabash river, and the right of way through the city if Terre Haute, amounts to four hundred and forty-seven thousand, seven hundred and sixty-six dollars, and forty-three cents.

It is not deemed advisable, during the current year, to make any further extension of branches, or to erect any new buildings.

In consequence of the large amount expended for equipment and building of branches, as above stated, and also of the excess
2023 of cost over the estimated — of building the Vandalia road it was found necessary to dispose of the remaining two hundred thousand dollars of bonds of the company. For the amount so paid out on account of the Vandalia road, the company has received certificates of stock in that road."

Q. Now, it is true, is it not, that the whole eight hundred thousand dollars of bonds were issued?

A. Yes sir.

Q. And it is true, is it not, that the cost of the double track, and of the extension for which the issue of bonds was ordered did not equal the proceeds of the bonds by $261,603.94?

A. Yes sir.

Q. There is no specific showing on the books whether that was applied to the equipment, or construction and equipment, of branches other than you have pointed out in the reports of the secretary?

A. I think not.

Q. On the books proper there is no explanation of that $261,603.94?

A. No sir, the proceeds of the bonds go into the general cash.

Q. And from that general cash these expenditures were made?

A. Yes sir.

Q. On page 315 of the evidence you answered that "The interest account on the ledger shows a balance to the debit of interest to the 31st of December, 1852, of $21,731.46, and interest is charged to construction $3,974.54, making a total of $25,706; and on the
2024 same day interest account is credited by this transportation $25,586, leaving a balance carried down to the next year of one hundred and twenty dollars."

A. Yes sir.

Q. Interest account had been credited by what amount—$25,586?

A. $25,586 to transportation.

Q. That was charged to transportation?

A. Yes sir.

Q. And that left a balance of $120 that was not taken out of the interest account and carried forward into the next year?

A. Yes.

Q. Now, I wish you would get your Exhibit 30, please. This is the earnings for 1862. In the net earnings for 1862, in the balance of $316,379.21, Mr. Williams on his cross-examination had you deduct——

A. Wait a moment, I do not find any such balance.

Q. On that exhibit what is credited to transportation on account of interest?

A. Nothing on this exhibit.

Q. For the year 1862, you deducted from the transportation earnings, after taking out the operating expenses, $200,514.38, leaving net balance $362,799.77 and from that deducted legal expenses $1,028.81, and the donation, $498.30, total $1,527.11, bringing down a balance of $361,272.66. Now, from this you again deducted interest and another item, $15,855, taxes $49,010.38, additional expenditures, $1,086.12, U. S. revenue, $2,095.91, ditto, $51—

2025 that is stamps, U. S. stamps—and new cars $20,895.04, making a total of $44,893.45 deducted from the previous balance, which left $316,379.21 Now, will you explain to us how you get at that $15,855? I will call your attention in that connection to the fact that there was a balance of interest for that year——

A. Let me answer your question first.

Q. I was going to help you.

A. Amongst the debits to interest account 1862, there is two charges for interest paid on seven per cent. bonds, which amount to $15,855, and which Mr. Williams upon his theory claimed was a proper amount to be deducted from transportation earnings, and that year was a credit balance of interest account transferred to surplus of $4,832.53. Looking over the interest account for various years it was agreed between Mr. Williams and myself as a witness that the transfer of the balance from interest account to surplus or profit and loss account would account for entries on both sides of the interest account, and therefore it seemed to me this $15,855 would be accounted for by the transfer.

Q. Is it not true that if this $15,855 should be taken out of the operating expenses, taken out of the transportation earnings for that year, so as to reduce the transportation earnings by $15,855 that the balance charged to surplus entered to surplus, should be $48,032.53, plus $15,855, or will we not have the $15,855 twice charged against us?

A. I think the latter—I think that would be the result of

2026 taking this out of interest account and off the transportation account.

Q. Then if the transfer to surplus is to stand this $15,855 that in his cross-examination Mr. Williams had you take from the transportation earnings should not have been taken from the transportation earnings, and the net transportation that year instead of being $316,379.21, should have been that amount plus $15,855, should it not?

A. I think so.

Mr. WILLIAMS: I want to call your attention, Mr. Ketcham, to the fact that in making up the earnings from other sources in the year 1862, I gave you credit for all of the interest side of the account. I think you will find that I avoided all error of that kind by giving a credit for the interest items that year. That was my purpose, I know, and I think you will find it so in the earnings from other sources for 1862. If I did not do that you are right about it.

Q. The result of it is then, Mr. Duy, that if this $15,855 is added to the surplus in addition to the $48,032.53, as a matter of book-keeping that would be correct?

A. It would be correct in so far as this matter of transportation is concerned.

Q. If the item of $15,855 on account of interest is not entered in the surplus account, it should have been deducted from the transportation expenses, leaving the net earnings from transporta-
2027 tion for the year 1862 $332,234.21, instead of $316,379.21 as you left it upon Mr. Williams' cross-examination.

A. Yes sir.

Mr. WILLIAMS: I do not think, Mr. Ketcham, the result of my cross-examination, when I came to ask about earnings from sources other than transportation, was to charge against us the credit side of interest account for that year. I intended to do it; had it in mind to do it, but I do not think I did so.

Mr. KETCHAM: It therefore ought to be added to surplus account, or else it ought to be deducted from operating expenses, leaving operating receipts that much larger during that year.

Mr. WILLIAMS: Yes sir; if you will have Mr. Duy give the credit side of interest account that year we can very readily get at it.

The WITNESS: It would make exactly the difference of $15,855. There are other items entering into it that you have already given us credit for, for a balance of forty-three hundred and some odd dollars, so that it will make it right just to add this $15,855 to it, to the earnings from other sources; that would leave—you want to take it off from transportation unless you want to add it to transportation and leave this.

2028 Q. It should be one or the other.

A. Of course it has the same general result; but if you want to have the transportation earnings right you would add it to that and leave this stand as it is.

Q. Leave surplus stand as it is?

A. That is right.

Q. At page 256 you were asked what amount was paid out that year for interest and exchange, to which you answered $5,638.51. Now during the year 1865 was there not a credit balance of interest to surplus?

A. The balance credited to surplus, $544.07

Q. On account of interest?

A. Yes sir.

Q. Is it not true then that with reference to the preceding amount there that surplus ought to be increased by this $5,638.51? Ought not the net earnings for the year 1855 be increased to that extent?

A. I think so.

Q. The $5,638.51, as you have given it, paid out for interest was the net amount, $3,038.26 being interest and exchange account, and the $5,638.51, less $600.25, namely, interest on bonds $350, and $17.50, and interest on bonds converted $232.75, total $600.25.

A. Yes sir.

Q. And the amount therefore that should go into the surplus, or else should be added to the net transportation receipts for that year is $5,038.26, is it not?

2029 A. $5,038.16

Q. No. $5,038.26, which the secretary's report also shows.

A. Yes, that is right.

Q. Now, at page 384, in answer to Mr. Williams, you explained the discount, on this $800,000 of bonds, namely, $20,700 on two hundred and seven thousand of the bonds, at page 341, of Journal D, and $12,000 on a discount of $120,000, and on ten bonds $500, and on page 363, discount to bond account for discount on eleven bonds, $11,000, ten per cent. off, $1,100, making a total of $34,300 transferred to surplus account. Explain to the master just what the aggregate of those entries with reference to the discount on the bonds means. In the first place to whom was the charge made on account of the $800,000 of bonds.

A. They were credited to bond account at the face of them. If the treasurer was charged with the face then there would be—sometimes the treasurer was charged just with the proceeds, and surplus or profit and loss would be charged with the discount. Sometimes the treasurer was charged with the amount of the face of the bonds sold, and then he was credited with the amount of the discount, and it would be charged to profit and loss or surplus, the result being the same thing, the treasurer would ultimately stand charged with the proceeds and profit and loss or surplus would stand charged with the discount, whatever it might be.

Q. And the entries taken as a whole mean that the company

2030 received that amount of money being the proceeds of the $800,000 of bonds less whatever the discount was.

A. Yes sir.

Q. Now on page 354, I see an entry here, or you speak of an entry here of a charge of a thousand dollars to the volunteer fund, and then on page 360, there is another charge for five thousand dollars, paid to the volunteer fund.

Mr. WILLIAMS: What year?

Mr. KETCHAM: That is during the year ending November 30th, 1865.

Mr. WILLIAMS: The thousand dollars was in 1864 and the five thousand dollars was in 1865.

Q. (continued). To what account were those two items of volunteer fund charged? Do you recall, or can you find out by turning to an exhibit?

A. Subscription to the bounty fund October 22nd, 1864, was charged to profit and loss.

Q. What was it in 1865, the $5,000?

A. In 1865 the subscription to the volunteer fund $5,000 was charged to transportation account.

Q. Now, I wish you would state to the master upon what theory

of bookkeeping or fact those six thousand dollars of moneys paid for inciting patriotism should be charged either to transportation or profit and loss.

A. Well, if they gave the money away, they have got to charge it some where. I don't know any other place they could
2031 charge it but profit and loss, unless they charged it to themselves.

Q. How about transportation?

A. Well, that would result in the same thing. I would not have charged it to transportation account.

Q. Well, upon what theory should it be charged to, to transportation, or to profit and loss account, except that they had to take account of it on some account, of this six thousand dollars that was gone?

A. I don't know of any other, unless they considered it a legitimate expenditure for the benefit of their business. If they called it a legitimate expense, then they properly charged it where other expenses were charged.

Q. In the year 1872, I think it is, there is an item of $14,448.58 charged to profit and loss, being the net charged amount $14,794.62 less $346.04. What is there upon the books to explain that charge?

A. I do not think there is anything on these books except the charge itself.

Q. What is there if anything upon the books to indicate that the Terre Haute and Indianapolis road during the time when these charges accrued, was operating the Vandalia road?

A. What year is that?

Q. 1872.

A. I do not think there is anything on the account books themselves. Yes, there is one item.

Q. What is that?

A. I think I mentioned the other day that there was one credit for that part of the earnings of the Vandalia system, which
2032 was made over the seven miles of T. H. & I. road. That would seem to indicate that they were operating it, but it didn't say.

Q. All there is then upon the books to show either a profit or loss by reason of the operation of the Vandalia road, was this item of charge of $448.58 on account of the re-casting of the account?

A. $14,448.58. I don't remember anything about those two entries that you mentioned awhile ago of debit and credit.

Q. Now, on Exhibit 41, the statement of net earnings, from December 1st, 1872, to January 15th, 1873, Mr. Williams had you take the amount of $36,658.15 which is shown on your Exhibit No. 41 and from that deduct an amount stated at $1,452.59. From what source did you get that $1,452.59 to be deducted from $36,658.15? You get at that did you not by taking, at his suggestion, the secretary's statement, $11,620.69 and dividing it by eight?

A. $1,452.58 is the amount.

Q. $1,452.39.

A. That brings that amount, but I don't know why it was done now.

Q. You had included in addition to one-eighth of the transportation earnings, $35,272.87 one-eighth of the car service, of the net earnings from rent and all the interest and exchange giving you $36,638.15?

A. Yes sir.

Q. One-eighth of those being several items, being $715.80, $265, $404.48, deducting those from $36,658.15 would leave the
2033 amount of the transportation earnings net for the one-eighth of the year at $35,272.87?

A. Correct.

Q. And then, he had you add to that the one-eighth of the secretary's statement, $11,620.69 for those corresponding items?

A. Yes sir.

Q. Making the balance $36,725.46, instead of your balance, $36,658.15?

A. Yes.

Q. Now, from this he had you deduct one-eighth of $74,060, namely, $9,257.50, on account of interest charged, leaving a balance of $27,467.96? Now, upon this Exhibit 41, do those items include all, those items that we have given above, do they include all of the net earnings during the year 1873, and if not, what other earnings were there, as shown on this Exhibit 41, concerning which you were not inquired of upon cross-examination?

A. There is an item of interest accrued on $105,500 of M. & C. Railroad Company Extension bonds, running at seven per cent. from August 1st, 1872, to January 15th, 1873, five and a half months, coupons matured, February 1st, 1873, $3,692.50, and were collected February 2nd. The amount accrued up to the 15th of January on those bonds was $3,384.75

Q. Any other items?

A. There was interest accrued on fifty thousand city of Evansville bonds from November 1st, 1872, to January 15th, 1873, two and a half months, coupons matured, May 1st, 1873, for $1,750, and were collected September 16th, 1873; $729.17 is the two and
2034 a half months' portion of that interest.

Q. Anything else?

A. Interest accrued on $2,000 St. L. V. and T. H. bonds, at seven per cent., coupons due January 1st, 1873, collected March 3rd, 1873, that would be seventy dollars; that was due the first of January.

Q. Any other interest on those bonds?

A. And there was interested on the same bonds from January 1st to 15th, upon coupons due July 1st, 1873, collected in August, 1873, $5.83, making a total of $75.83.

Q. Any other collections?

A. Interest accrued on one thousand St. L. V. & T. H. Railroad second mortgage bonds, seven per cent., coupons due the first of

May, 1873, collected July 31st, 1873; that would be two and a half months, $14.58.

Q. Any others?

A. Interest on two hundred thousand dollars, St. L. V. & T. H. Company second mortgage convertible bonds, seven per cent., upon coupon due the first of May, 1873, collected July 31st, 1873; the two and a half months would be two thousand nine hundred and sixteen dollars and sixty-six cents, there is a dividend No. 41, six per cent. on three hundred and forty-eight thousand six hundred dollars T. H. & I. stock held by Rose, trustee, entered April 9th, 1873, the proportion of that dividend, $20,916; a proportion of dividend 42 on the same, from December 31st, 1872, to January 15th, 1873, entered September 13th, 1873 $1,745, making $22,659, the entire dividend.

2035 Q. Didn't the first amount—you say the entire dividend?

A. Yes sir.

Q. That was a dividend for the six months ending November 30th, 1872, but not received until April, 1873?

A. Yes sir.

Q. And the other was the dividend for a portion of that period?

A. From December to January.

Q. Now, what other items were there?

A. There is an item from profit and loss account of 1873, U. S. military account for transportation from July 23, 1867, to July 31st, 1868, not heretofore entered—entered on Journal C, page 293, March 25th, 1873—$2,815.25. There is another item of United States military transportation furnished from July 7th, to December 11th, 1867, not entered before—entered now in Journal E, page 294, March 27th, 1873—$1,818. There is another item, United States military transportation from December 9th, 1867 to May 22nd, 1869, not previously entered—Journal E, page 347, August 1st, 1873—$128.42; and a further item, military transportation, from April 29th, to May 6th, 1867, not having been previously entered—Journal E, page 351, August 9th, 1873—$21; making a total of $4,782.67; on which there must be made a deduction by the Government on an old transportation account of 1867, Journal E, page 302, April 12th, 1873, $150.86, leaving $4,631.81 of earnings.

2036 Q. Anything else?

A. There is an item of interest accrued on St. L. Vandalia and Terre Haute seven per cent. income bonds. An explanation of this item will be found on page 5 of Exhibit No. 18, "Two hundred and fourteen income bonds of one thousand dollars each taken by the company in 1871 and 1872, at a cost of one hundred and sixty-one thousand seven hundred dollars, were dated March first, 1871, and drew seven per cent. interest payable annually. These bonds were held until December 29th, 1874; at that date, Journal E, page 579, interest was added on 174 bonds from their date and on 40 bonds from March 1st, 1872 to the date of the trade. They were then exchanged for preferred stock of the St. L. V. & T. H. Company as below stated, 214 bonds at par, interest $214,000., interest added

$43,383.33, making $257,383.35, for which this company received 2,574 shares of preferred stock dated April 1st, 1874, bearing 7 per cent. interest which stood on the books at the original cost of the income bonds, $161,700; the interest on the 214 income bonds, accrued up to the 15th of January, 1873 would be $23,415.—No, $25,287.50.

Q. Now, what do all of these last items that you have given commencing with the interest on the Evansville and Crawfordsville Extension bonds and ending with the income bonds of the St. Louis, Vandalia and Terre Haute aggregate as shown on Exhibit No. 41?

A. $59,699.30

Q. And what portion of that was actually paid during the
2037 year 1873 and what portion was outstanding at the close of the year 1873?

A. Paid in 1873 $34,411.80; outstanding $25,287.50, which is the amount of interest on the Vandalia income bonds.

Q. Now, in stating the net earnings for the proportion of the year will you please explain why the $34,411.80, which was paid during the year should not be added to the $9,257.50 which you gave to Mr. Williams upon his cross-examination as the amount of the net earnings that year, why that amount at any rate should not be added.

A. I gave him that amount upon the transportation earnings. There is no reason why this should not be added to it, as earnings, that I know of.

Q. And the other amount $25,208.50 was outstanding as an asset and was subsequently taken by the road in preferred stock in place of the income bonds.

A. Yes sir.

Q. With the interest added?

A. Yes sir.

Q. And this amount of interest was actually earned up to the 17th of January, 1873?

A. Yes sir.

Q. I think you have heretofore explained that the item of $10,000 paid to Mr. McKeen in 1869 through the intervention of the entries upon the foreign agents and machine shop account 'c reduced to that extent the transportation earnings for that year?

A. If it was charged to transportation, yes, it did.

Q. Well, it was charged to transportation, was it not?

A. Yes sir.

2038 Q. And that item is included in the statement you made to Mr Williams upon cross-examination of the net earnings for 1869, $289,347.91, and unless that were a proper charge to transportation, transportation earnings for that year, instead of being $269,347.91, should have been $399,447.91.

A. Yes sir.

Q. At pages 472 and 473 you were asked by Mr. Williams in regard to your Exhibit No. 50. The expenses in 1877 for rebuilding

bridges and culverts $36,912.03 real estate for depot grounds, &c., $736., for passenger cars $4,514.78. Those are the same amounts, are they not, that previously in his cross-examination he had had you deduct from the transportation earnings as transportation expenses in order to get at the net transportation receipts, were they not?

A. I think so.

Q. They were put in your exhibit as additional expenditures but they are the amounts that he had you take in order to get at the net transportation earnings as you gave it to him in your answers upon cross-examination.

A. Yes sir.

Q. The same is true with reference to the items of similar character, of $15,890.70 for the year 1858 for rebuilding bridges and culverts and the extension of depot at Indianapolis, $715.98, aggregating all the items on that page aggregating $17,537.21 The total deduction was $17,537.21 as shown on page 473. Those are the same items that in answering to him the net transportation
2039 receipts for the year 1858 you had already deducted, were they not?

A. Already deducted from where?

Q. From the transportation earnings, so as to give you the net transportation receipts.

A. I cannot answer that without looking at my exhibit.

Q. I do not care anything about the exhibit. At pages 472 and 473 you were asked these questions and you made these answers: "Question. How much was expended in 1857 for rebuilding bridges and culverts? Answer. $36,912.03." And at page 327 while you were being examined with reference to your exhibit showing the transportation earnings during that year you were asked this question: "Question. What, if any additional expenditures are shown to have been made during that year 1857 by this exhibit? Answer. Do you want the items? Question. Yes please, repairing bridges and culverts $36,912.03; real estate for depot grounds, $100.00; page 472, for the same purpose, $100.00; at page 327, real estate for gravel and sand, $736.00; at page 473. "Question. How much for real estate for gravel Answer. $736 and at page 327, "Passenger cars $4,514.78," and at page 473 "Question. How much for passenger cars. Answer. $4,514.78." Are those the same matters, the one as a deduction of transportation earnings and the other as the basis of a construction account?

A. They are at any rate the same item, yes sir.

Q. Now, during this cross-examination you were asked about your exhibit in which you stated for one or two years following the year 1856 the item of "rebuilding bridges," and after that
2040 time the item of "repair," the item was stated as "repair of bridges" I will get you to state whether it was not entered upon the ledger and the journal and through the books as "repairs of bridges"?

A. I will have to look at the book for that.

Q. Or "rebuilding bridges." See what the entry was in the ledger.

Mr. WILLIAMS: He has already testified that it was under the head of "repair of bridges."

The MASTER: And in the secretary's report it was "rebuilding bridges." I think that was pretty thoroughly gone into.

Mr. KETCHAM: If that is so that is sufficient; I do not want to duplicate it.

Q. Now at pages 519 and 520 of the evidence you were asked this question by Mr. Williams: Question. Mr. Duy, if you were to take the aggregate of these four items on the credit side of surplus account page 3, of Exhibit 47, namely: By profit and loss $5,872.20; by interest on E. & C. Extension bonds $7,385.00; by rent $1,038.00; by interest and exchange $4,832.53. Wouldn't that aggregate represent all of the earnings with which we ought to be charged outside of those which are in the transportation? The balance of interest account has gone into that surplus account. The balance of profit and loss account has gone into that surplus account?" To which you answered "It don't come out exactly right." And
2041 then Mr. Williams asked "Well, I ask the question as an inquirer seeking light; I am not sure of it, but it seems to me that that ought to be right. Now, Mr. Duy, can you add anything to what appears there to explain the situation as you look at it?" to which you answered "If we give you the benefit of two debtor items on Exhibit 48, page 4, in the year 1862, amounting to $925.50 your proposition is correct." "Question. And the reason you make the calculation is that you are not sure that in accounting with the State the company would be entitled to take as a credit against the State losses that they sustained in the sale of some stock of bonds that they had. Answer. Well, that was simply a suggestion in my own mind, therefore I gave the detailed items on both sides and showed the earnings, and also the losses, that it might be settled by the proper authority." Now will you explain to the master just what you mean by that, and how the effect of a credit to profit and loss will depend upon the correctness of a charge to the debit of profit and loss.

A. I think you will have to get that statement and look over it.

Q. I think I can give it to you without going back. Suppose there was an unquestioned earning that was credited to profit and loss, and then there was a charge to profit and loss, for example, of a donation for patriotic purposes, but which it should transpire was not a proper charge to profit and loss, and only the debits of a profit
and loss account entered into the surplus, would not the
2042 profit and loss be incorrectly diminished by just the amount that the entry charged to profit and loss with itself incorrect.

A. Yes sir.

Q. If, therefore, in this case, being a charge to profit and loss by reason of some outside investments, if it should transpire that the

outside investments were not proper to be made, a charge to profit and loss by reason of the loss sustained in those outside investments would not be a correct charge, the result of which would be to diminish unquestioned earnings.

A. That would be the result of such a charge.

Whereupon, the further hearing was continued until Monday, November 20th, 1899, at ten a. m.

2043 WEDNESDAY, *December* 20, 1899—2 o'clock p. m.

The parties met pursuant to adjournment.

Present: Messrs. W. A. Ketcham and R. O. Hawkins, of counsel for plaintiff, and Mr. John G. Williams, of counsel for defendant.

The re-examination of GEORGE C. DUY was resumed as follows:

Questions by W. A. KETCHAM, Esq.:

Q. Mr. Duy, at one of out preceding sessions I asked you to explain in regard to the difference between the two amounts $746,006.30 given as gross debits on the ledger on the year 1852, while in the statements that have been put in evidence they were given as $990,929.36. That is in the testimony at page 234. That appears on pages 63 and 91 of the ledger and at that time you were not able to make an explanation. If you have an explanation now I wish you would give it to the master.

A. In answer to that question, what is the statement of construction for the year 1852, what does it aggregate, I answered $746,006.30 is the debit side no credits off. In making up this sum *O* omitted three items posted on the ledger January 1st, after the balance of December 31st, 1852, had been brought down, which three items amounted to $263,875.54, which added to the amount above given gives the actual debits for 1852 $1,009,881.84. I gave
2044 the credits on the ledger for 1852 as $19,012.48. It should have been $18,952.48, and deducting this from the debits gives a net sum of $990,929.36, which agrees with the Exhibits 3 and 4.

Q. And that was in fact the amount which was shown by the ledger in place of the $746,006.30 as you gave it in error by not carrying down the credits far enough?

A. Yes sir; there were two balances struck, that is the fact about it, as will be readily seen by looking at the face of the ledger.

Q. Now at the same time in the evidence pages 235 and 6 what was stated to be the difference between the statements on the face of the ledger as to the construction for 1853, being stated on the one to be $345,487.45, and on the other $102,611.81 the difference being $242,675.64; and at that time you were not able to make an explanation. Have you examined into the matter and are you able to give us an explanation of that apparent discrepancy?

A. Yes sir; in answer to the question page 235 of the evidence

as to the charges in construction account on the ledger for 1853 I answered $374,282.17. In this sum I included the $263,875.54, posted January 1st, 1853, after the balance of December 1st, 1852 had been brought down as above stated and which sum I had in a former answer excluded from the debits of 1852. Putting that sum into the account of 1853 and deducting it from what I gave
2045 as the amount charged in 1853, gives the correct amount for 1853 $110,406.63. In giving the amounts of credits on the ledger for 1853 I gave $28,794.72; this was wrong; it should have been $7,794.72, and deducting this from $110,406.63 leaves $102,611.81, net debits instead of $81,611.81 as would appear from the evidence and this makes our statement and the ledger agree except for an error of ten cents in the ledger footing.

Q. Now, Mr. Duy, at pages 519 and 20 you were asked as to whether the profit and loss was not properly cared for because there was a balance transferred and in answer to Mr. Williams' question that the reason you make that calculation is you are not sure in accounting with the State the company would be entitled to take as a credit against the State losses that they sustained in some stock and bonds you answered, "That was simply a suggestion in my own mind, therefore I gave the detailed items on both sides and showed the earnings and also the losses, that that might be settled by the proper authorities." Now, will you explain a little more fully what you mean by your answer to that question? Suppose the balance of profit and loss to be carried to surplus as a credit and suppose that in that profit and loss there were included an item that upon final consideration should appear not to be properly charged against the State, which would be the effect of carrying to the surplus simply the balance of the profit and loss account as to such charge?

A. The balance carried forward would be that much less than it ought to be.

2046 Q. That is, if the charge to profit and loss was an erroneous charge to profit and loss, the profit and loss that was credited to surplus would be that much greater, would it not?

A. Yes sir; and that would appear as an earning so far as the State was concerned.

Q. Now, upon page 526, you were asked about the item of $1,726.50. Turn to page 526 of the evidence Mr. Duy, without my reading it all, and I will call your attention to the two items charged to profit and loss $1,726.50 as found in your evidence on page 526 and of $6,651.85 as found on page 527. Does the transfer of the profit and loss account account for those two items?

A. How much was transferred?

Q. The amount was $13,594.50; then there is a charge here of $1,726.50 and $11,764 is transferred.

A. What account is it in; can you give me that?

Q. I think it was the Evansville and Crawfordsville account; you were asked to please look at page 4 of Exhibit 48 and see if the balance of the profit and loss account for that year was not transferred to surplus; and you say "Yes sir." Then the evidence

proceeds: "Then that item will be accounted for in the surplus account? A. Yes sir, as a matter of bookkeeping. Q. Now you have us charged that year, 1863, with surplus $11,764. On page 3 of Exhibit 47, being itemized surplus account, I find a credit there to surplus of these three items: $897, rent account; $3,500, E. & C. Railroad bonds interest; — no, C. & I. Railroad bonds interest; $7,385, E. & C. Railroad bonds interest. A. Yes sir. Q. And these three items make
2047 *items make* up the $11,764. with which you have charged on account of surplus? A. Yes sir. Q. Now the interest and profit and loss account both having been transferred to surplus, and being taken care of in surplus account by reason of the transfer of their respective balances, should not $11,764 be the amount chargeable to us that year, as a matter of bookkeeping. A. Yes, sir. Q. Instead of $13,594.50 with which you have us charged? A. That is right; no, I don't think that $1,726. is accounted for. Q. Which, Mr. Duy? A. Profit and loss; well let us see, I don't know. Q. That $1,726.50 appears on the credit side of profit and loss account as being amount realized from wood sold during the year, and profit and loss account that year has a single debit just as it had that single credit of loss on sale of St. Louis, Alton and Terre Haute bonds taken at par by this company, and sold at a discount. Now so far as bookkeeping is concerned, it is taken care of. A. That seems to take care of it. Q. As to whether or not we are entitled to credit for the loss on those bonds as against the State, that I am not asking you about. A. I notice that the secretary in statement No. 2 credits that $1,726.50 as earnings. I was looking for something to balance it, but I don't find it. That charge of $6,651.85 to profit and loss is for an absolute loss. Q. An absolute loss, yes sir. A. And that would stand to the debit of profit and loss account. Q. As a matter of bookkeeping? A. Well it would any way because it is charged directly to profit and loss
2048 account. Now he credits to that side—suppose there hadn't been any wood sold, he would have transferred the whole of that loss; but there being wood sold, it operates as a credit. But I don't think it ought to. It wouldn't show the facts. Q. Well, Mr. Duy, if you were to add that as a credit, as a charge against us for wood sold, then we ought to take and debit surplus with the whole amount of that loss? A. That is what I am looking for. Q. And we reached the same result by debiting surplus with the difference between wood sold and the total loss." Now, what is the fact about those two matters?

A. That $1,726.50 is a credit to the profit and loss account, Exhibit 48, page 4, for wood sold during the year.

Q. That was an actual gain then?

A. That was an actual gain as appears from the books. We looked at the ledger at the time we were going over this before and concluded that that was different from the other charges to profit and loss in that it closed the account and never was charged back

again. I think that should stand as a credit as an earning, in addition to the $11,764 surplus.

Q. Now look at page 529——

A. (Interrupting). And my impression is that was agreed to at the time.

Mr. WILLIAMS: No, it was the cross-tie account you have in mind.

The WITNESS: Cross-tie account, was it?

2049 Mr. WILLIAMS: I did agree as to the cross-tie account and we included that.

Q. Now at page 529 you were asked in regard to the interest item of $2,204.68; that seems to be in connection with the Alton account; that is on Exhibit No. 17.

A. What is the item? Or, does it give the page?

Q. Exhibit 17, if you will look at page 5 you will find May interest on bonds held by this company $2,204.68.

A. I can't recollect about that.

Q. I will pass that for the present; I will come to it, I think, in connection with another feature, and if I do not we will look it up later. Now in 1864 there was——

A. (Interrupting.) I have that now I think.

Q. We will go back then; if you have that $2,204.68; what was that item?

A. That was for May interest on St. Louis, Alton and Terre Haute bonds held by this company $2,204.68

Q. Well now was that included in the net balance that was charged to profit and loss or is that an earning in excess of the balance that is charged up to profit and loss?

A. I think the way to answer that would be to state this account.

Q. Well, state the account and let us see where we are. It has been a good while since I have been over this and I made a notation at the time to ask about it.

A. This statement of the St. Louis, Alton and Terre Haute
2050 Railroad Company second mortgage bonds. The account stands charged, November 20, 1862, to amount of bonds, $94,552.59. On the credit side are the following entries: October 12, 1863 by amount deposited with Farmers' Loan and Trust Company, by Corning and Sons agent for sale of bonds $54,290.32; October 24, by amount deposited by same $31,405.74; December 1st, by May interest on bonds held by this company $2,204.68; by profit and loss, amount of loss on the sale of bonds taken at par and sold at a discount $6,651.85. Total of the credits being $94,552.59 the same as the dividend. The account shows the sale of these bonds and these two deposits in the bank there for the proceeds, and then the account is credited with the interest and the net balance is charged off to profit and loss account.

Q. So that that would seem to care for the interest, $2204.68.

A. In making up our statement of earnings we have for that year charged the $1,726.50 to profit and loss and $11,764. for surplus, making $13,490.50; and we have deducted from that this loss,

$6,651.85, leaving $6,838.65 and added to that this item of interest on bonds $2,204.68 as earnings.

Q. Now, in stating the account of the earnings from transportation in the year 1864 you answered to Mr. Williams that the interest was $6,271.43 and that amount was deducted from the earnings in order to arrive at the net earnings. During that year the net charge of account of interest was $1,218.92. I will ask you whether the whole of the $6,271.43, the balance of interest being only
2051 $1,218.92, should have been deducted in order to arrive at the net transportation earnings?

A. No sir, I think not.

Q. Should it not be that the net transportation earnings given for that year should be increased by the $5,152.51, being the difference between the $6,271.43 which was deducted and the $1,218.92, which was the balance of interest for that year?

A. Unless it was taken care of in some other way, and I think it was not in our calculations.

Q. I will ask you Mr. Duy, to look at the account of the machine shop as it appeared in the books and see if there was a credit in 1875 of $80,000, and what it covered and what disposition of it was made.

A. Are you sure you have that right? I have the journal here for 1875 and I can't find it.

Q. Have you got the machine shop account, George? Earnings in the machine shop?

A. I have the machine shop account here.

Q. Now, I will pass that matter until Mr. Cleland comes. Mr. Duy, in giving the net earnings to Mr. Williams for the year 1864 you first gave the transportation as $1,007,979.21, and operating expenses $467,352.54; balance $540,626.67. From this $540,626.67 there was in turn deducted, tax on receipts in machine shop $19,372.26; State and county taxes $976.10; interest and exchange $6,371.43; total $32,660.79, which deducted from the $540,626.67 left balance brought down of $507,965.88; from which in turn there was deducted on account of locomotives, passenger cars,
2052 freight cars, new buildings, repairs of bridges, volunteer fund $1,000, donation to State fair grounds,—a total of $161,482.39; leaving the final net earnings from transportation in your answer to Mr. Williams for the year 1864 $346,483.49. Now, I call your attention to the amount of interest, the balance of interest that was transferred to surplus, $1,218.92 I believe, and I will ask you to state whether it is proper to charge up the net earnings the entire amount of interest and exchange $6,371.43, and then take only the balance of $1,218.92 that was transferred to surplus?

A. No sir.

Q. If the balance only is to be transferred to surplus?

A. (Interrupting.) Then those other items are provided for.

Q. Then to the extent of the difference between $6,371.43 and $1,218.92, the net earnings for that year ought to have been increased, ought they not?

A. Yes sir.

Q. If then the $1,000 of a donation to the volunteer fund should not be deemed a proper part of transportation, the balance that you gave included a deduction of $1,000 on the account of volunteer fund should be increased that amount, should it not?

A. Yes sir.

Q. If therefore there was only $1,218.92 the balance of the interest carried to surplus, and if the amount paid to the volunteer fund was not a proper charge to transportation, the transportation earnings for that year instead of being $346,483.49 would be

2053 what?

A. It should be $352,636.

Q. Now, at page 541 you are asked in regard to this same item of $1,000 on account of the volunteer fund, it being included by the treasurer in his statement of additional expenditures in that year. If there is added to the net earnings for that year $1,000 which had been erroneously taken out on account of the $1,000 subscribed to the volunteer fund, that would sufficiently account for it?

A. Yes sir.

Q. If it is not added then when the secretary carries $14,715.34 to surplus for that year on account of additional expenditures the $1,000 should be included in that, if it was not a proper charge.

A. Yes sir, one way or the other.

Q. That is if the subscription of $1,000 to the volunteer fund was neither an additional expenditure nor an operating expense, not a proper expense, it ought to be cared for either in the earnings account or in the surplus account.

A. Yes sir.

Q. On page 4 of Exhibit 48 you find there an item for the proceeds of the sale of cars and lathe sold less the amount debited for work on flat cars, of $26,668.23.

A. Yes.

Q. Now what was done with the proceeds of the cars and the lathe, were they credited to construction?

A. No sir, they stand as a credit to profit and loss account.

Q. And that eventually works into the surplus account?

2054 A. Yes sir.

Q. So that it works out the same as though it had been originally charged to construction and then credited to construction?

A. Oh, you mean originally charged to construction?

Q. Yes.

A. I can't answer that question whether it is charged to construction or not.

Q. Well, in the outcome, if they were credited to profit and loss and profit and loss carried to surplus would the effect of it be the same as if having been originally charged to construction that were again credited to construction?

A. Yes the effect would be the same because if that were credited

back to construction that would reduce the construction account that much.

Q. Now for the year 1866. I find there that in getting at the transportation earnings a charge of $2,018 What was the balance of interest and exchange that year, a debit or a credit?

A. A balance of $6,286.26 passed to surplus account.

Q. Credit on account of interest?

A. Yes sir.

Q. Well it is the balance that has passed to that credit?

A. Yes sir.

Q. Now why should $2,018 paid out on account of interest be deducted from the transportation earnings in that year when only the balance is carried to surplus. Ought not either the balance carried to surplus be carried by that $2,018, or ought not the $2,018

2055 not to have been deducted from the transportation earnings? In other words did not the carrying of the balance account for the items of which that balance is composed?

A. Yes sir.

Q. Now that year you gave to Mr. Williams on his cross-examination the transportation earnings as being $1,049,720.28; and the operating expenses as $616,115.66; a balance brought down of $433,604.62 From that there was deducted, Government taxes $27,171.56; State and county taxes $7,435.75; and interest $2,018; total $36,625.31, leaving a balance of $396,979.31. And from that in turn was deducted the amount of $104,040.53 on account of new buildings, cars purchased, telegraph line, carpenter shop, etc., leaving the final net earnings for that year $292,938.78. Now in view of the fact that the balance of the interest only was carried to surplus, ought not the net earnings for that year be increased by $2,018, the amount that was deducted on account of that interest?

A. I think so; yes sir.

Q. Then if that were erroneously deducted and were added to the balance as you gave it to Mr. Williams, $292,938.78, what would be the correct net earnings for that year?

A. $294,956.78

Q. And in the event that the balance of the interest account only was carried to surplus account that would properly represent the final net earnings for that year from transportation?

A. Yes sir.

2056 Q. Now at pages 563 and 564 Mr. Williams asked you about the secretary's bookkeeping. Page 562; "Q. The secretary reports material sold $11,321.84. Do you know without looking it up how he gets that amount? A. No sir, I do not. Q. I will ask you to follow me as I give you the items which go to make it up. In that year, 1869, profit and loss is credited, as shown on page 9 of Exhibit 48, with the following items: Wood on hand December 1st, $18,077.80. Do you find that? A. Yes. Q. Cross-ties on hand December 1st, 1868, $10,376. A. Yes. Q. Railroad iron, chairs, spikes, and so forth on hand same date $64,824.71. Do you find that? A. Yes sir. Q. Machine shop material on hand December

1st, 1868, $52,207.04. A. Yes. Q. Now, have you those items down so that you can give me the aggregate of them? A. Yes sir. $145,485.55 Q. Now, on page 10 of this same Exhibit 48 do you not find the following items to the credit side of profit and loss account: Wood on hand December 1st, $32,595. A. Yes sir. Q. Cross-ties on hand same date $7,220. A. Yes sir. Q. Railroad iron, chair, and so forth on hand same date $25,658.31. A. Yes. Q. Machine shop material on hand same date $68,690.40. A. Yes. Q. Now the aggregate of those items please. A. $134,163.71 Q. Now take that from the other aggregate of $145,485.55 and give me the remainder. A. $11,321.84 Q. And is not that the same that the secretary reports as material sold? A. Yes sir. Q. The secretary then has reported as an earning the credit balance of those
2057 four accounts, has he not? A. Yes sir. Q. And you did not take them into consideration at all in making up your statement, did you? A. No."

Now, I wish you would explain to the master why that $11,000, being the difference between the $145,485.55 and $134,163.71 should be treated as an earning?

A. I don't think it should be at all.

Q. It simply means that at a certain time the road had certain supplies on hand and at a certain other time that it had certain less supplies on hand.

A. Yes.

Q. And the difference between the supplies at one time and the other had been used in connection with the road?

A. That they used more than they bought or bought more than they used in the course of the year.

Q. And that amount in the various exhibits you have not accounted for as an earning and if there is any theory upon which it should be accounted as an earning I should like to understand it.

A. I have thought about it a great deal; I can't bring my mind to look at it as an earning at all. It is a sort of a bookkeeping entry and the condition of things would be precisely the same as if he had not made those charges and credits to profit and loss account. The various accounts of machine shop, and so forth, would have exhibited those balances more or less each year just the same way. I don't think the secretary himself treats it as earnings; my recollection that his statement is of receipts and expenditures; he don't call it earnings himself.

2058 Q. Now, where in any of these accounts that you have made, that have been introduced is there any charge against the company for that amount as earnings?

A. No, sir.

Q. And the only effect of it if that were properly to be considered as earnings would be to add that amount to the sum that is included in these exhibits showing the earnings that they have made during the year?

A. Yes.

Q. And your impression is that it should not?

A. Yes, sir.

Q. Now, in going over in detail the construction account in 1857 in answer to Mr. Williams you had given these items as aggregating $63,548.58. I will ask you if there was not another item than the one you were considering on the question of construction in the year 1857 in addition to the $63,548.58? I call your attention especially to the item of patent car brakes. Look at Exhibit 43.

A. I have got it.

Q. Now, what do you find charged to transportation during the year 1857 on account of additional expenditures?

A. I find in Exhibit 50 page 1, total charges to transportation for 1857 $71,364 43. Deducting from that an item for taxes, $6,255.85, leaves $65,108.58 and that includes an item for patent brakes, $1,560.

Q. What was that charged to transportation?

A. Transportation account.

Q. Adding that amount to the $63,548.58 that you gave to
2059 Mr. Williams upon his cross-examination, what do you have for the total amount exclusive of taxes charged to transportation on account of these additional expenditures in the year 1865?

A. $65,108.58

Q. Now go to the year 1858. In answer to Mr. Williams you gave those additional expenditures as $17,537.21 I will ask you if there was not an item of $505 on account of equipment car account?

A. $405.

Q. $405?

A. That was left out.

Q. That you didn't give in answer to Mr. Williams?

A. No sir.

Q. What then would be the total expenditures charged to transportation during the year 1858 including this item of $405 equipment car account?

A. $17,942.21. Please tell me what I did give Mr. Williams?

Q. $17,537.21

A. That is right.

Q. Now on the basis of the construction account as you answered it to Mr. Williams upon his cross-examination with these changes that you have made I wish you would state by the year so that we may have it in a compact form what that construction account from 1847 to 1862 was?

A.

1847.....	$3,500.39
1848.....	1,436.55
1849.....	85,214.02
1850.....	131,608.76
1851.....	689,948.54

2060

1852.....	413,190.60
1853.....	110,627.09
1854.....	29 796.96
1855.....	36,844.78
1856.....	109,283.31

Mr. WILLIAMS: You didn't give that to me.
The WITNESS: What?
Mr. WILLIAMS: That last you didn't give to me.
(To counsel:) If you ask him what he gave to me, he didn't give me that last amount.
Mr. KETCHAM: Yes he did.
Mr. WILLIAMS: He gave me $113,598.53
Mr. KETCHAM: Yes, and at the same time he gave you a forty-three hundred dollar credit to that.
Mr. WILLIAMS: Which he said was a mere bookkeeping entry put on there for the purpose of putting the construction account up to the stock and bond account
Mr. KETCHAM: I understand.
Mr. WILLIAMS: Well, it didn't come out of any expenditures at all. That amount was expended that year, exclusive of that four thousand dollar item.

Q. What do these all foot up to that time including the year 1856?
A. $1,611,450
Q. 1857?
A. $65,108.58
Q. 1858?
2061 A. $17,942.21

Mr. WILLIAMS: He gave me no such items as that for construction if the master please, if the question still applies to that.
Mr. KETCHAM: He did do that thing and the question applies to that. I asked him what he gave Mr. Williams with the correction that he has just made of the $1,560 in the one case and the $405 in the other case.

Q. 1859?
A. $7,903.70
Q. 1860?
A. $16,892.39
Q. 1861?
A. $8,969.77
Q. 1962?
A. $21,981.16
Q. And what did the total amount to at the time?
A. $1,750,247.81
Q. Now turning to the net earnings year by year as you have given them heretofore; I will ask you to state first what were the net earnings from transportation and what from other sources for the year 1851 and the total?
A. Transportation..... $1,561.58
Other sources..... 859.35

Total..... 2,420.93

Q. For 1852?
A. Transportation total $45,860.05
Q. For 1853?
2062 A. For 1853 transportation total, $63,395.71
Q. For 1854?
A. For 1854 transportation $114,537.55
Q. For 1855?
A. Transportation $148,327.32
Q. For 1856?
A. Transportation..... $342,393.81
Other sources..... 17,260.25

Total..... 359,654.06

Q. Now wait a moment; I want to get at that transportation for 1856. Well, go on. For 1857?
A. 1857, transportation..... $182,875.05
Other sources 4,857.12

Total 187,730.17

Q. For 1858?
A. Transportation $161,144.54
Other sources 374.89

Total 161,519.43

Q. For 1859?
A. Transportation alone $160,082.62
Q. For 1860?
A. Transportation $191,195.07
Other sources 171.75

Total 191,366.82

Mr. WILLIAMS: Pardon me; haven't you earnings from other sources for 1859?

The WITNESS: In 1858 there is; not for 1859.

Mr. WILLIAMS: You don't mean you gave me that?

Mr. KETCHAM: Yes.

Mr. WILLIAMS: He gave me $2,700.70 and he gave me in
2063 1859 $821.48 Do you get that for 1858 on pages 511 and 513?

Mr. KETCHAM: I see that $12,000 stock of the Evansville and Crawfordsville Railroad Company was taken as an entirety, not simply in part or in pieces, if that is what you refer to.

Mr. WILLIAMS: It shows there $2,700.70 doesn't it as earnings from other sources for that year? Page 513.

Mr. KETCHAM: I don't see any such item here, Mr. Williams.

Mr. WILLIAMS: Well, the page I gave you goes to make it up. I

don't know whether it is on that page or not, but it is from page 511 to 513, that subject was discussed.

The MASTER: It is on page 512.

Mr. HAWKINS: That $2,700.70 is on Exhibit 48, page 3, profit and loss account.

Mr. WILLIAMS: What we are talking about is what the evidence shows and he is asking him what he gave me and I didn't think it was wise to get it mixed because he did give me the $2,700.70 and I have so charged ourselves with it.

The WITNESS: I have it here.

Q. Now, Mr. Williams has called attention to that, Mr. Duy, will you explain to the master how you get that amount of $374.89 when Mr. Williams called your attention to this item of $2,700.70?

2064 A. The total credits to profit and loss that year are $2,700.70 but there is a charge there of $2,325.81 leaving a balance transferred to credit of surplus account of $374.89, net earnings.

Q. The $2,700.70 was gross earnings and the $374.89 was net earnings?

A. Yes sir.

Q. And it is the net earnings that I am now inquiring of you.

A. Yes sir.

Mr. WILLIAMS: Now let him explain 1859, Mr. Ketcham, where he gives nothing but I have $821.48, pages 514 and 515.

Q. Explain that, Mr. Duy.

A. That total debits that year are $2,918.42 and the only credit is $821.48, but there is a balance charged to surplus account of $2,096.94 to close the account and that would cover the $821.48 that was given as earnings before.

Q. While *that* there was that year $821.48 of earnings, there were losses that would more than equal it?

A. Yes sir, that was a loss on depreciated currency that ought to be taken off.

Q. Well there were two items charged that year aggregating $2,918.42. What were they?

A. One was for loss on depreciated paper in the hands of the treasurer $2,393.42; and the other was balance of Atlantic and Mississippi Railroad Company account transferred to close the account, $525.

2065 Mr. WILLIAMS: That wasn't any loss.

The WITNESS: Yes.

Mr. WILLIAMS: It was a transfer of the account.

The WITNESS: It closed up the account and the balance of the account was charged off to profit and loss account; it represented a loss.

Q. Go to 1861, Mr. Duy.

A. Transportation $181,439.99
Other sources 7,793.75

Total..... .. 189,233.74

Q. 1862?
A. Transportation $332,234.21
Other sources 20,053.23

Total 352,287.44

Q. Now in that connection I will call your attention to the fact that in your original examination you answered Mr. Williams the net earnings from transportation were $316,379.21. How do you account for the difference between that amount and the $332,234.21?

Mr. WILLIAMS: It is caused Mr. Ketcham, if you will permit me, by adding $15,355. of interest which you had him deduct and was erroneously deducted. The right amonnt is $332,234.21. That interest should not have been deducted, but I don't agree with him on the earnings from other sources.

2066 Q. Then Mr. Duy will you explain what that $20,053.23, the amount from other sources, consists of.

A. The way I get at that now is: Interest, $4,832.53; surplus $8,423.; profit and loss account $6,797.70; that makes it $920.50 more than it was before.

Q. I noticed in your examination, to Mr. Williams, you spoke about that $920.50; can you explain to the master how that difference of $920.50 was arrived at?

A. That is a charge to profit and loss account for loss on Madison and Indianapolis Railroad bonds and preferred stock, in making our estimate now of these profits that we haven't deducted.

Q. That is to say there was a certain amount of the funds of this road invested in the first place in the Madison and Indianapolis bonds and then afterwards in the Madison and Indianapolis preferred stock, and on that they charged out a loss of $925.50 that you have not included?

A. I have not deducted.

Q. You have not deducted from this $20,053.23; that is the difference?

A. Yes sir.

Q. 1863?
A. Transportation $307,527.15
Other sources 9,043.33

Total 316,570.48

Mr. WILLIAMS: In his answers to me, Mr. Ketcham, he gave me earnings from other sources that year as $11,764.

Q. Well give us the earnings from other sources, Mr. Duy,
2067 for that year and let us see what they are.

A. Profit and loss account..... $1,726.50
Surplus..... 11,764.00

Total..... 13,490.50

less loss on St. Louis, Alton and Terre Haute bonds, $6,651.85, leaving a balance of $6,838.65 and add interest on St. Louis, Alton and Terre Haute bonds $2,204.68; it makes a total of $9,043.33

Q. In reaching this result, you have taken out the loss on the St. Louis, Alton and Terre Haute bonds charged to profit and loss or $6,651.85?

A. Yes sir.

Q. For 1864?

A. Transportation..... $352,636.00
Other sources 41,001.38

Mr. WILLIAMS: What was your transportation, $352,636?

The WITNESS: We corrected that a while ago.

Q. I call your attention right in that connection to the fact that in your answer to Mr. Williams you had originally stated that to be $346,483.49; and the change is the item of $5,152.51, where interest had been deducted, where the balance only had been credited to surplus and then the $1,000 was volunteer fund that had been deducted in getting at the $346,000?

A. Yes sir.

Q. That accounts for that difference?

A. Yes sir.

Mr. WILLIAMS: I haven't got that amount yet.

2068 The WITNESS: $352,336. More than it was before.

Mr. KETCHAM: Mr. Williams, is there any question about that $41,001.38?

Mr. WILLIAMS: Isn't it $40,001.38?

Mr. KETCHAM: I guess that is right, because it includes that $1,000 of the volunteer fund twice.

Mr. WILLIAMS: No, that volunteer fund hasn't anything to do with it.

Q. Well, give us the items Mr. Duy, and let us see.

A. That is made up of, credit from profit and loss account, $15,715.34

Mr. WILLIAMS: It should be fourteen thousand shouldn't it?

A. (Continuing:) That includes a debit charge of subscription to bounty fund $1,000.

Q. You have worked that bounty fund in twice, haven't you?

A. You worked it in this morning and I worked it in on this business.

Q. I don't know whether it is the same fund or not. There isn't but $1,000 of bounty that year.

A. I don't know. There is some bounty and some volunteer fund. I don't remember.

Q. In one place it is called subscription to volunteer's and in another it is referred to as bounty fund.

Mr. HAWKINS: This was in the same year with that sub-
2069 scription to volunteers.

Mr. WILLIAMS: That is what you have done because the transfer from profit and loss of that year was $14,715.34 and not fifteen thousand.

Q. I wish you would turn to page 4 of Exhibit 48 and if you find anything there with reference to the subscription to the bounty fund you may state what it is.

A. I find a charge to profit and loss account October 22, 1864, subscription to bounty fund $1,000

Q. Now I wish you would turn to transportation account and see what if anything you have charged there.

A. There is nothing charged to transportation for that year.

Q. Then there was but the $1,000 on account of the volunteer fund patriotism in this year of 1864?

A. Yes.

Q. And if that $1,000 is used to increase the net earnings from transportation it ought not be used to increase the net earnings from other sources.

A. No sir.

Q. The amount should be either $351,636 in place of $352,636 or it ought to be $40,038 in place of $41,038.

A. Yes, that is the way it seems now.

Q. The amount for that year, the total net earnings for that year would be $392,637.38 instead of $293,637.38?

2070 A. Yes sir.

Q. Well 1865?

A. Transportation..... ... $341,706.36
Other sources..... 20,829.91

Mr. KETCHAM: How does that agree with you?

Mr. WILLIAMS: The earnings from other sources agrees with me but the transportation earnings does not.

Mr. KETCHAM: Oh well I know that myself.

Mr. WILLIAMS: He never gave me such an amount as he stated just now.

Q. Transportation earnings. I will call your attention to the fact that for 1865 you gave the original transportation earnings as being $1,248,725.88, from which you deducted the operating expenses $615,656.96, leaving a balance of $633,068.92; from which you deducted on account of taxes, interest and exchange and other items a total of $70,062.49, leaving a balance of $561,004.33; from

this you deducted in turn the additional expenditures aggregating $229,336.23, leaving the final net balance as stated to Mr. Williams of $331,668.10. Now I will ask you if *it* included in the deduction for that year under the head of other expenditures you haven't any subdued patriotism in the shape of a $5,000 subscription to the volunteer fund?

A. Subscription to the volunteer fund $5,000.

Q. That was included in the item of additional expenditures?

A. Yes sir.

Q. If it should transpire that that deduction of $5,000 from
2071 transportation receipts was an improper deduction, to that extent the transportation receipts should be increased, should they not?

A. Yes sir.

Q. Now I call your attention to the fact that included in this item of $72,564.59 there is deducted from transportation earnings on account of interest and exchange $5,038.26. What was the status of the interest that year? Did it go through to surplus, through the balance transferred?

Mr. WILLIAMS: In order to save time, Mr. Ketcham, I will state that amount of $5,038.26 should be added to the amount that he gave me before. The taking out of that interest was a mistake in the statement of the account and if that be added it makes $336,706.36 which we claim as the balance of the transportation earnings for that year.

Q. Then the only question is the question over the $5,000?

Mr. WILLIAMS: I presume so.

Mr. KETCHAM: That is a question of law and not a question of fact.

Q. Upon that the difference between the amount that you give now and the amount originally given with the statement of Mr. Williams, arises out of that $5,000 of donation to the volunteer fund?

A. Yes sir.

2072 Q. And the $341,706.36 that you have given——

A. Includes that $5,000.

Q. And that would then be true as to the total, $362,536.27?

A. Yes sir.

Q. Now for 1866?

A. Transportation, $294,956.78

Q. Now before passing from that I will call your attention to the fact that in answering Mr. Williams, you gave the net transportation as $292,938.78 and to the further fact that there was deducted from the transportation that year $2,018. on account of interest. I wish you would explain whether there was a balance of interest transferred to surplus and if therefore that $2,018 was a proper deduction from transportation earnings?

A. That $2,018 having been deducted from transportation earnings it is proper to put it in here as a credit from other sources.

Q. Well we have not got it in here as a credit from other sources, because from other sources there was not transferred anything but the balance of interest.

A. I say it is proper to put it in now.

Q. We put it into transportation rather than other sources; it has not gone into other sources as I recollect it.

A. I don't know.

Q. It would result the same whether it went in as from other sources or as from transportation, would it not?

A. Oh yes, it would be the same in the aggregate. We
2073 should try to get them all the same way. What year is this?

Q. This is the year 1866.

A. Surplus is credited with the balance transferred $6,286.26

Q. That therefore takes care of the $2,018, does it not?

A. I think so.

Q. Therefore in arriving at the true net transportation that $2,018 which had been deducted ought to be deducted, leaving the balance $292,938.78 as you have stated it?

A. That is the way I think it is.

Q. Now what have you for earnings from other sources for 1866?

A. $31,956.52. The total is $326,913.30.

Q. For 1867?

A. Transportation.....	$409,615.42
Other sources.....	59,026.29
Total.....	468,641.71

Mr. WILLIAMS: Both agree with me.

Q. 1868?

A. Transportation.....	$344,018.89
Other sources.....	86,424.49
Total.....	430,443.38

Mr. WILLIAMS: Both check with me.

Q. 1869?

A. Transportation.....	$299,347.91
Other sources.....	66,851.61
2074 Total	$366,199.52

Mr. WILLIAMS: Neither check with me.

Q. I call your attention to the fact that for the year 1869 you answered to Mr. Williams that the total net earnings for transportation receipts were $289,347.91. I call your attention further to the item of $10,000 concerning which you have testified as coming from the machine shop, foreign agent——

Mr. WILLIAMS: No it was not; it was road repairs, station expense and foreign agents.

Q. (Continuing:) Yes; if in point of fact that $10,000—that was in fact charged to transportation, was it not?

A. I believe so.

Q. If in point of fact that amount of $10,000 was for example for service in the legislature in connection with the General Assembly, or in any other way not a proper charge to transportation the net transportation earnings for that year would have been increased by just that $10,000?

A. Yes sir.

Q. That is the explanation of the difference between the $289,000 and the $299,000 as you have given it? That is the fact, is it?

A. Yes sir.

Q. Now will you give the composition of the earnings from other sources and let us see how we get at that?

2075 Mr. KETCHAM: What did you get that, Mr. Williams?
Mr. WILLIAMS: I have it $88,173.45.

Q. Will you give us the composition of the other earnings for the year 1869?

A. What is the difference?

Q. The difference is $21,321.84.

A. No I don't think I can see.

Mr. WILLIAMS: I can tell you. You haven't charged me up with $11,000, for the machine shop and you have charged me again with the $10,000 that you have added to the transportation expenses.

Mr. KETCHAM: No that wouldn't do, because that would make it more out of the way.

Mr. WILLIAMS: No, that is twenty-one thousand three hundred and odd dollars.

Mr. KETCHAM: No the difference is greater. Your amount is greater than our amount.

Mr. WILLIAMS: Well you have taken it out then.

The WITNESS: $11,321.84, that is all right.

Mr. WILLIAMS: Well now you have the $10,000 item; where is it?

The WITNESS: Just an even $10,000?

Mr. WILLIAMS: I charge myself with that material.

Mr. KETCHAM: Well we will not let you.

The WITNESS: I will have to take better light than I have
2076 got now. I cannot figure this out in this light.

Whereupon, the further hearing was adjourned until tomorrow morning at ten o'clock.

2077 THURSDAY, *December* 21, 1899—10 o'clock a. m.

The parties met pursuant to adjournment.

Present, the same as heretofore, with the exception of Ferdinand Winter and Judge Robert S. Taylor, of counsel for plaintiff, and Lawrence Maxwell, of counsel for defendant.

The re-direct-examination of GEORGE C. DUY, was resumed, as follows:

Questions by WILLIAM A. KETCHAM, Esq.:

Q. Now, Mr. Duy, have you found that twenty-one thousand dollars that you were looking for in the dark last night? If so, will you give us the composition of it?

A. In 1869 we have the earnings from other sources, $66,851.61; that is composed of interest, $1,857.25; surplus $61,908.11, profit and loss $3,086.25; and the latter is arrived at in this way: There are credits to profit and loss account in that year for earnings, of $25., $8,450., $2000., $235., and $550., amounting to $11,260. From that I have deducted the actual loss on the sale of fifty thousand Cincinnati & Indianapolis Railroad bonds, $8,173.75, leaving for the net profit, from profit and loss, as I stated, $3,086.25. In stating this account before there was included an amount of ten thousand dollars, which is explained in this way: On the 30th of November, 1867, Journal D,

2078 page 114, there is an entry charging profit and loss, and crediting the C. & I. Railroad bonds with the sum of ten thousand dollars, upon a revaluation of those bonds, and other property; and this entry made in 1869, at the time of this sale, is a charge back to these bonds, and a credit to profit and loss of the same sum of ten thousand dollars, evidently made to cancel the former entry, and to bring the bonds back up to their original cost of fifty thousand dollars. After that time they were sold and the net loss, $8,173.75 appears on the debit side. I think, therefore, that that ten thousand dollars ought not to go into the earnings.

Q. That is to say, instead of the arbitrary charge of ten thousand dollars to profit and loss, the actual loss that was sustained, $8,173.75, was charged to profit and loss?

A. Yes.

Q. And if the ten thousand dollars had remained in, after taking out the $8,173.75, that would have been a double charge to profit and loss?

A. Yes sir.

Q. Now, what was the total, then, for the year 1869?

A. $66,851.61

Q. That is, other earnings, but the total earnings?

A. The difference of eleven thousand dollars and something was accounted for yesterday by the fact that we leave out the machine shop and material—eleven thousand and something—whatever it is; I don't remember. The total now, for 1869, as I have it, is $366,199.52.

Q. Now, what did you have for the transportation earnings in 1870?

2079 A. I have $194,720.50

Q. That is the amount that, upon cross-examination, you answered to Mr. Williams, I believe. Now what was the amount from other earnings for that year 1870?

A. $84,000.04; total $278,720.54.

Mr. KETCHAM: How does that correspond with your figures, $84,000.04, Mr. Williams?

Mr. WILLIAMS: They check with mine. My other is $194,720.50

Mr. DUY: That is right.

Q. From what exhibit were those figures taken—those other earnings for 1869? The additional earnings for 1869, $66,851.61, from what were those figures taken?

A. $66,851.61—well, I haven't it here;—here it is.

Q. Is it on Exhibit 45, page 12?

A. I think a stranger to those figures, looking into Exhibit 45 page 12, would hardly be able to arrive at the conclusion that I have stated in my evidence.

Mr. WILLIAMS: What exhibit is that?

The WITNESS: That is earnings other than transportation.

Mr. WILLIAMS: You stated that as $75,025.

The WITNESS: $77,000, it is. This statement that I am making now is a corrected statement, after the original examination, and after the cross-examination while Exhibit 45 is the basis of

2080 it, the information is drawn from other sources. As, for instance, as Mr. Williams says, I gave it originally from Exhibit 45, as $75,025.36—I think it is—but from that was deducted $2,287.25 and interest—no, that was the balance of my statement on Exhibit No. 45, less $2,287.25 and interest, which we concluded should come off, but leaving the interest as I have stated now, $1,857.25, and the surplus as I have stated now, $61,908.11; and then I had on Exhibit 45, $11,260., from which I have taken, as I stated, $8,173.75, for loss on those bonds; then there was an item of $11,321.84 for material on hand, which I have left out.

Q. That you have heretofore explained on yesterday?

A. Yes sir.

Q. Now, I wish you would go to the year 1871, and tell us what you have of net earnings from transportation during that year, as answered to Mr. Williams upon cross-examination?

A. Well, I can't remember what answer I made to Mr. Williams; my memory is that it is the same, $257,351.78.

Q. And what about other earnings from other sources?

A. $79,637.18, total $336,988.96

Mr. KETCHAM: Does that correspond with your figures, Mr. Williams,—that $79,637.18?

Mr. WILLIAMS: I have it $116,423.48

Q. Will you give me the composition of that earnings from other sources, in 1871?

2081 A. Profit and loss, $3,112.03; surplus, $76,525.15

Q. How did you get at that profit and loss, that item of $3,112.03?

Mr. WILLIAMS: If you will permit me, Mr. Ketcham, the difference between the amount of income from other sources, as now stated by witness and the amount I just stated, is $36,786.30, and that amount is made up entirely of the charges that I recognize for material sold, being the difference between the supply accounts and the profits and loss account.

Mr. KETCHAM: That is to say—that is a matter that we went over before—that at the expiration of the year the supply accounts being transferred and it is simply an elimination of those supply accounts transferred?

Mr. WILLIAMS: Yes; that would be the only difference between us.

Mr. KETCHAM: And in this answer the witness has placed that much less than you have stated it, on the secretary's reports?

The WITNESS: Yes, that accounts for it.

Q. Well, then, we will pass from that to the year 1872. Will you give us the net earnings from transportation as you answered it to Mr. Williams upon his cross-examination, finding the net balance?

A. $221,252.53.

Q. Now, the earnings from other sources?

A. $75,336.47; total, $296,589.

2082 Mr. KETCHAM: How does that seventy-five thousand correspond with your figures, Mr. Williams?

Mr. WILLIAMS: I have it $79,758.18

Mr. HAWKINS: There is a difference there of $4,421.71

Q. Give us the composition of that.

A. I have from interest, $5,934.47, and from profit and loss, $69,402.

Mr. WILLIAMS: The balance of the supply accounts represented $6,671.71, which exceeds the difference between us.

Mr. KETCHAM: There is a difference there of $4,421.71 and the difference between that and your $6,671.71 is $2,250.

Mr. WILLIAMS: That is due to the fact that on the former examination Mr. Duy gave the amount of that profit and loss account as $67,152., instead of $69,402. as he gives it now.

The WITNESS: That is right, $69,402. is that what I have it now.

Mr. WILLIAMS: Before you had it $67,152., made up of two items, interest on bonds $25,095. and interest on stocks $42,057

The WITNESS: That is the interest, $67,152., is that what I gave you?

Mr. WILLIAMS: Yes.

The WITNESS: Well, there is an item of $2,250., from the
2083 sale of two shares of Union Star Line stock.

Mr. KETCHAM: Still, that don't make the difference between the $79,758.18 and seventy-five thousand.

The WITNESS: Yes it does. That is the machine shop material.

Q. Then the amount that you have now given, $75,336.47, is arrived at by adding to this amount heretofore given upon cross-examination, $2,250., on account of the profit in the sale of the Union Star Line stock, and deducting the $6,671.71, appearing in the secretary's report as materials used in the machine shop?

A. Yes sir.

Q. Now, for the year 1873, what, in answering Mr. Williams on cross-examination, have you as the net balance from the net transportation earnings?

A. $27,467.96.

Q. Now, what other earnings for that year, have you—give me first, the aggregate, and then give them to me in detail.

A. I have $75,935.30.

Q. Of what items was that composed?

A. Profit and loss $12,750.

Q. What was that $12,750?

A. That was from the sale of real estate.

Q. What real estate was it?

A. The profit and loss account has credit, November 30, 1873, Journal E, page 418, by real estate T. H. & I. extension, $750., and by real estate for depot grounds, $12,000., total $12,750.

2084 Q. $750. was real estate in Vigo county, wasn't it—T. H. & I. extension, what real estate was that?

A. I think that was part of some lots in Linton's addition to Terre Haute.

Q. And the twelve thousand dollars is what?

A. The journal just says "real estate for depot grounds."

Q. Is there any description anywheres in the books, of it?—Isn't that the property that was down south of the Terre Haute line, adjacent to or near White river, that was sold to Ferguson & Co., for a pork house?

A. I think so, but I cannot be sure about it; I think it was part of the cemetery property.

Q. Adjacent to the cemetery?

A. Yes sir.

Mr. KETCHAM: Do you know about that, as a matter of fact, Mr. Williams?

Mr. WILLIAMS: I do not think that real estate account was put in evidence. I have a reference, Mr. Duy, that that is on Exhibit 48.

The WITNESS: It is on 48 A; Journal E, page 279, under date of February 18, 1873, and there appears an entry, sundries to real estate, for depot grounds, J. H. Hager, treasurer, $6,000, bills receivable $6,000., making twelve thousand dollars, and the property is

described as three acres of that portion of the T. H. & I. Railroad Company's grounds known as the Greenlawn cemetery, Indianapolis, said three acres having been sold to James C. Ferguson,
2085 of Indianapolis, at the rate of four thousand dollars per acre; terms of payment, one-half cash and the balance in note at eighteen months. That went to the credit of real estate for depot grounds under date of February 18, 1873, on Ledger D, 491, and remained there until November 30, 1873, and it is credited off to profit and loss.

Q. Are you sufficiently familiar with the surroundings of Indianapolis to tell us where Greenlawn cemetery is—what portion of the city it is in?

A. My impression is that it is southwest, or south of the old T. H. & I. Railroad depot.

Q. Where the old Vincennes road comes in?

A. Yes sir.

Q. It lies north and northwest of the Vincennes road and south of the Terre Haute road, does it not?

A. Yes sir.

Q. Do you remember where the Ferguson pork house was?

A. No; it is right in there somewhere; I can't locate the street.

Q. But with reference to the line of the Terre Haute road and Greenlawn cemetery?

A. No sir, I don't know where it is.

Mr. WILLIAMS: It lies immediately south of our present round house and coal shed. It now belongs to Gardner. It lies abutting White river, immediately adjoining our property now, on which the round house and tracks are located.

2086 Q. Now, we will go from the $12,750., to the next item.

A. Interest on stock and bonds, from Exhibit 41, $53,324.49.

Q. Have you the exhibit there, so that you can give us the details of that interest?

A. Yes sir. Interest on $105,500. of E. & C. Railroad Company Extension bonds, from August 1, 1872, to January 15, 1873, five and a half months, on coupons maturing February 1, 1873, for $3,692.50, whish was collected February 24, 1873, Journal E., page 282; the amount is $3,384.75. Interest on fifty thousand City of Evansville bonds, from November 1, 1872 to January 15, 1873, for two and a half months, on coupons maturing May 1, 1873, for $1,750., same collected September 16, 1873, Journal E, page 367, amount $729.17. Interest on two thousand St. Louis, Vandalia & Terre Haute Railroad bonds, on coupons due January 1, 1873, collected March 3, 1873, Journal E. page 285, $70. And the same bonds, on January 1, 1873, to January 15, 1873, coupons due July 1, 1873, collected August 14, 1873, Journal E, page 354, $5.83. Interest on one thousand St. Louis, Vandalia & Terre Haute Railroad Company second mortgage bonds, on coupons due May 1, 1873, collected July 31, 1873, Journal E, page 347, interest for two and a half months, $14.48. Interest on two hundred thousand St. Louis, Vandalia

& Terre Haute Railroad Company second mortgage bonds, on coupons due May 1, 1873, collected July 1, 1873, Journal E, page 347, two and a half months, $2,916.66.

2087 Dividend No. 41, six per cent. on $348,600., of T. H. & I. stock, held by Rose, trustee, entered April 9, 1873, Journal E., page 301, $20,916. Interest accrued on 174,000 St. Louis, Vandalia & Terre Haute bonds, from March 1, 1871, to November 30, 1872, one year and nine months, $21,315. Interest accrued on forty thousand, same bonds from March, 1, 1872, to November 30, 1872, nine months, $2,100. Interest accrued on 214,000 income bonds, on December 1, 1872, to January 15, 1873, $1,872.50 There is a fuller explanation of that accrued interest in Exhibit No. 18.

Q. Now, what is the next item, Mr. Duy?

A. The next item is one-eighth of the dividends on the T. H. & I. stock for the year 1873; that would be the dividend for the six weeks from November 30 to January 15, $5,229.

Q. The other dividend that you gave us in this statement was what.

A. That was dividend forty-one, declared on the earnings of——

Q. It is the dividend actually declared, and this eighth of the next dividend?

A. Yes sir.

Q. And what else have you?

A. And then there is receipts from the Government, United States military transportation, set out in Exhibit 41, $4,631.81.

Q. And what was the total?

A. $75,935.30

Q. That is the total of the earnings from other sources

A. Yes sir.

2088 Q. Now, what was the total from transportation and other sources?

A. $103,403.26

Q. Will you state what was the aggregate of the net total earnings from transportation and other sources from 1851 to 1873, inclusive?

A. Deducting the thousand dollar error found yesterday in the account of 1864, the total is $5,656,059.64

Q. Now, in order that it may appear in the record in a compact shape, I wish you would give by years the construction account, as you have given it in your answer to Mr. Williams, upon cross-examination, with the two changes that were noted yesterday, for the years 1857 and 1858, and also the net total earnings, year by year, as revised, as you have given it to us on yesterday and to-day.

A.—

Year.	Construction.	Net total earnings.
1847	$3,500.39	
1848	1,436.55	
1849	85,214.02	
1850	131,608.76	
1851	689,948.54	$2,420.93
1852	413,190.60	45,860.05
1853	110,627.09	63,395.71
1854	29,795.96	114,537.55
1855	36,844.78	148,327.32
1856	109,283.31	359,654.06
Footing	$1,611,450.00	$734,195.62
1857	65,108.58	187,730.17

2089 Mr. WILLIAMS: I wish to note here that the witness gave me no construction account, as such, for the year 1857, or for any year subsequent to 1856, until he got down to 1869.

Year.	Construction.	Net total earnings.
1858	$17,942.21	$161,519.43
1859	7,903.70	160,082.62
1860	16,892.39	191,366.82
1861	8,969.77	189,233.74
1862	21,981.16	352,287.44
Total		$1,750,247.81
1863		$316,570.48
1864		392,637.38
1865		362,536.27
1866		326,913.30
1867		468,641.71
1868		430,443.38
1869		366,199.52
1870		278,720.54
1871		336,988.96
1872		296,589.00
1873		103,403.26
Total		$5,656,059.64

Mr. WILLIAMS: Please note that this statement of net earnings does not tally with the net earnings as given to me by the witness on my cross-examination.

2090 Q. With reference to the note one, Mr. Duy, I will call your attention now to the amounts from 1857 to 1862, inclusive, under the head of construction, and I will get you to state what, upon the books, those amounts were designated as being?

A. My recollection is that they were designated in the secretary's report as additional expenditures.

Q. Were they not so called on the books—the construction account, as you have heretofore explained, was closed in 1856, was it not?

A. Yes sir.

Q. And those various items that you have given, succeeding the year 1856, and up to the year 1862, were the items classified as additional expenditures, or other expenditures, but not charged directly as transportation expenses?

A. Yes sir.

Q. These are the particular items concerning which you were interrogated by Mr. Williams, upon his cross-examination, with respect to the arriving at the net earnings during the period covered, from 1856 to 1862?

A. Yes sir; they are embodied in our Exhibit No. 50, statement of expenditures exclusive of operating expenses, interest and dividends, from the year 1857 to 1862. They are charged on the books to transportation account, and profit and loss account and surplus account.

Q. With respect to the second note suggested by Mr. Williams, that those items do not correspond with the amounts that you have answered to him, as to the net total earnings, you may state
2091 to the master what the figures that you have just given, represent with reference to those figures that you had given to Mr. Williams, upon his cross-examination?

A. They represent a revision of the statements heretofore made, and change, or correction.

Q. As you explained?

A. Yes, as I explained while I was going over them.

Q. Now, Mr. Duy, I will ask you this question: Assuming that the construction account ended in 1856, with a total net amount charged to construction, of $1,611,450, distributed by years as follows: In 1847, $3,500.39; in 1848, $1,436.55; in 1849, $85,214.02; in 1850, $131,608.76; in 1851, $689,948.54; in 1852, $413,190.60; in 1853, $110,627.09; in 1854, $29,795.96; in 1855, $36,844.78; in 1856, $109,283.31, being the amount you have heretofore answered for that year, $113,598.53, less $4,315.22, credited on account of interest during the entire period; assuming that upon these several amounts, simple interest at the rate of ten per cent. should be allowed, until the entire amount had been equalled by the net earnings, as hereinafter given you, and that after such interest and the principal had been equalled by the amount of such net earnings, dividends might be retained at the rate of fifteen per centum each year, on the amount of $1,611,450., such net earnings to be considered by you being as follows: For the year 1851, $2,420.93; for the year 1853,

$63,395.71; for the year 1854, $114,537.55; for the year 1855, $148,327.32; for the year 1856, $359,654.06; for the year 1857,
2092 $187,737.17; for the year 1858, $161,519.43; for the year 1859, $160,082,62; for the year 1860, $191,366.82; for the year 1861, $189.233.74; for the year 1862, $352,287.44; for the year 1863, $316,570.48; for the year 1864, $393,637.38; for the year 1865, $362,536.27; for the year 1866, $326,913.30; for the year 1867, $468,641.71; for the year 1868, $430,433.38; for the year 1869 $366,199.52; for the year 1870, $278,720.54; for the year 1871' $336,9?8.96; for the year 1872, $296,589; for the year 1873, $103,403.26; have you prepared and will you furnish a table which I will ask the reporter to designate as table A, showing what amount, if any there was, on the 17th of January, 1873, after allowing ten per centum upon the principal so invested, until the principal and the interest had been returned by the net earnings, and thereafter allowing dividends upon the principal at the rate of fifteen per centum per annum, for each year or part of year, and state what such excess amounted to, if any, on the 17th of January, 1873, as shown by such table?

A. I have prepared such a table and now produce it and the amount asked for it is $861,376.44.

Q. Now, assuming that the construction account closed in 1862, with the amount of $1,750,247.81, distributed by years as follows: In 1847, $3,500.39; in 1848, $1,436.55; in 1849, $85,214.02; in 1850, $131,608.76; in 1851, $689,948.54; in 1852, $413,190.60; in 1853, $110,627.09; in 1854, $29,795.96; in 1855, $36,844.78; in
2093 1856, $109,283.31; in 1857, $65,108.58; in 1858, $17,942.21; in 1859, $7,903.70; in 1860, $16,892.39; in 1861, $8,969.77; and in 1862, $21,981.16; assuming that upon these several amounts simple interest at the rate of ten per cent. per annum should be allowed until the entire amount had been equalled by the net earnings, as hereinafter given to you, and that after such interest and the principal had been equaled by the amount of such net earnings, dividends might be retained at the rate of fifteen per centum each year, on the amount of $1,750,247.81, such net earnings to be considered by you being as follows: For the year 1851, $2,420.93; for the year 1852, $45,860.05; for the year 1869, $366,199.52; for the year 1870, $278,720.54; for the year 1871, $336,988.96; for the year 1872, $296,589; for the year 1873, $103,403.26—have you prepared and will you furnish a table, which I will ask the reporter to designate as table B, showing what amount, if any there was, on the 17th of January, 1873, after allowing ten per centum upon the principal so invested, until the principal and the interest had been returned by the net earnings, and thereafter, allowing dividends upon the principal at the rate of fifteen per centum for each year or part of year, and state what such excess amounted to on the 17th of January, 1873, as shown by such table?

A. I have that table made out now and produce it, and the amount asked for is, $688,275.72.

2094 Q. Assuming that the full sum invested by the stockholders amounted to $1,216,690.05, distributed by years as follows: For the year 1847, $2,411.; for the year 1848, $5,185.; for the year 1849, $51,990.; for the year 1850, $148,428.71; for the year 1851, $173,465.81; for the year 1852, $225,509.81; for the year 1853, $63,642.14; for the year 1854, $168,568.80; for the year 1855, $47,031.97; for the year 1856, $108.319.77; for the year 1857, $48,174.30; for the year 1858, $13,381.75; for the year 1859, $4,460.58; for the year 1860, nothing; for the year 1861, nothing; for the year 1862, $52,634.88; for the year 1863, $68,692.98; for the year 1864, $5,352.70; for the year 1865, $24,979.27; for the year 1866, $4,460.58; have you prepared a table, which I will ask the reporter to designate as table C; assuming that upon the sums so invested by the stockholders interest should be allowed at the rate of ten per cent. per annum until the full amount so invested by the stockholders, together with such interest had been returned to them by the dividends declared, and that on all such sums so invested thenceforth, annual dividends might be paid by the stockholders, upon the amounts so invested, at the rate of fifteen per cent. per annum; showing what, on the 17th of January, 1873, of the dividends declared, including the portion of the dividend up to January, 1873, there remained of such dividends declared, in excess of the full sum invested, with interest at the rate of ten per cent.
2095 per annum, until such principal and interest had been returned, and in excess thereafter of the fifteen per cent. per annum upon such sum invested, and state what such excess amounted to, for the purpose of this computation including the two stock dividends of $211,600. made in 1856 and $376,700. made in 1864?

A. I have prepared such a table, and now produce it and the amount asked for is, $1,346,236.84.

Q. Assuming that the full sum invested by the stockholders amounted to $1,216,690.05, distributed by years as follows: For the year 1847, $2,411; for the year 1848, $5,185.; for the year 1849, $51,990.; for the year 1850, $148,428.71; for the year 1851, $173,465.81; for the year 1852, $225,509.81; for the year 1853, $63,642.14; for the year 1854, $168,568.80; for the year 1855 $47,031.97; for the year 1857, $48,174.30; for the year 1858, $13,381.75; for the year 1859, $4,460.58; for the year 1860, nothing; for the year 1861, nothing; for the year 1862, $52,634.88; for the year 1863, $68,692.98; for the year 1864 $5,352.70; for the year 1865, $24,979.27; for the year 1866, $4,460.58; assuming that upon these several amounts simple interest at the rate of ten per cent. per annum should be allowed until the entire amount had been equaled by the net earnings, as hereinafter given to you, and that after such principal and interest had been equaled by the amount of such net earnings, dividends might be retained at the rate of fifteen per centum each year, on the amount of $1,216,690.05, such net
2096 earnings to be considered by you being as follows: For the year 1851, $2,420.93; for the year 1852, $45,860.05; for

the year 1853, $63,395.71; for the year 1854, $114,537.55; for the year 1855, $148,327.32; for the year 1856, $359,654.06; for the year 1857, $187,737.17; for the year 1858, $161,519.43; for the year 1859, $160,082.62; for the year 1860, $191,366.82; for the year 1861, $189,233.74; for the year 1862, $352,287.44; for the year 1863, $316,570.48; for the year 1864, $393,637.38; for the year 1865, $362,536.27; for the year 1866, $326,913.30; for the year 1867, $468,641.71; for the year 1868, $430,433.38; for the year 1869, $366,199.52; for the year 1870, $278,720.54; for the year 1871, $336,988.96; for the year 1872, $296,589; for the year 1873, $103,403.26—have you prepared and will you furnish a table, which I will ask the reporter to designate as table D, showing what amount, if any there was on the 17th day of January 1873 after allowing ten per centum upon the principal so invested, until the principal and the interest had been returned by the net earnings, and thereafter allowing dividends upon the principal, at the rate of fifteen per centum per annum for each year or part of year and state what such excess amounted to on the 17th of January, 1873 as shown by such table.

A. I have prepared such table, and now produce it, and the amount asked for is $2,771,339.78.

The hour of twelve o'clock, noon, having arrived, the hearing was adjourned until two o'clock p. m.

2097 THURSDAY, *December* 21, 1899—2 o'clock p. m.

The parties met pursuant to adjournment.

Present the same as before recess.

The re-direct examination of the witness GEORGE C. DUY, was resumed as follows:

Questions by W. A. KETCHAM, Esq.:

Q. Have you also in addition to tables A and B, and each of them, prepared tables which I will ask the reporter to designate as tables A 2 and B 2, eliminating from each of them all the interest and discount charged to construction and assuming, for the purpose of such tables, that whatever interest and discount may have been charged, to construction was not a proper charge?

A. Yes sir.

Q. Will you produce it and state what amount will be due, on the same basis as included in table A, but eliminating the interest and discount on the 17th of January, 1873?

A In table A 2 the amount is $1,089,737.12 in table B 2 the amount is $901,979.03.

2098 Q. Have you prepared footnotes to each of these tables, except table C, showing by years the amount of State and county taxes paid, adding to the amount for each year interest at the rate of ten per cent. per annum, up to and including the

year in which the amount of construction, or the full sum invested, as the case may be, together with the interest at the rate of ten per cent. per annum, had been equaled by the net earnings or the dividends in the particular case, and will you give us the total amount of such taxes, including interest up to that period, but thereafter including no interest?

A. I have prepared such notes and they are attached to tables A, B, A 2, B 2, and D; there is none attached to table C. The amount of taxes and interest on the note attached to table A, including the taxes of 1871, is $239,049.97. It is impossible to give, from the books furnished me, the taxes of 1872, and the proportion of the tax of 1873. Those taxes would probably amount to eighteen thousand dollars. The amount of taxes on the note to table B, with interest, is $250,792; up to 1871. As before stated, I can not give taxes for 1872 and part of 1873. The amount of taxes to 1871, and interest, in the note attached to table D is $197,747.55. No
2099 tax for 1872 and part of 1873 is given. The amount of taxes to 1871 and interest in the note attached to table A 2 is $219,997.35, and the amount of taxes to 1871, and interest on table B 2 is $239,151.87; no taxes for 1872 and part of 1873 is given.

Q. Have you prepared and will you produce second footnote to these various tables, showing the amount of expenditures for the years 1868, to 1872, on account of branches and sidings, double track, extensions, equipment and construction equipment, in excess to the mortgage bonds of $800,000., outstanding Jan. 17, 1873? If so will you state what the excess amounts to?

A. I have prepared such a statement and there is a copy attached to each one of the tables produced. The balance over and above the $800,000, of bonds outstanding, is $324,263.39.

Q. Have you prepared a table showing by years, the earnings other than the earnings from transportation? If so, will you produce such table, and state from what accounts these additional earnings come, and what the aggregate is?

A. I have such a statement; earnings other than transportation, from interest, profit and loss and surplus revised. This — a revision of a former statement which was put in as an exhibit in this
2100 case. The total amount is $681,412.86. I think there are perhaps, one or two items in this that are taken from other accounts.

Q. Now, I will call your attention, in this exhibit, to the amount of $40,001.38 in the year 1864, and in connection with that the thousand dollars of subscription to volunteer fund, that, upon other exhibits, having been taken care of in the net earnings—to that extent that amount should be changed, should it not?

A. Yes, it should be $40,001.38.

Q. And the footing should be a thousand dollars——

A. Less.

Q. Which should be $680,412.86?

A. Yes sir.

Q. Will you make that change now, before it goes in evidence?

A. Yes sir. I would like to state here, if it is proper, that on these tables which I have prepared, the calculation is based upon the net total earnings of 1864, as I originally gave them this morning,—$393,637.38. By the error discovered this morning that should be $392,637.38; and it would make that difference in the result of the calculation on each table.

2101 Q. That is, take table A, for example, in what manner, without entirely recasting that table, can we ascertain the balance due on the fifteenth day of Jan. 1873—by deducting a thousand dollars with interest?

A. Reduce the result a thousand dollars, with interest on it from November 1, 1864, at the rate of ten per cent.

Q. And the same thing would be true for each of the tables, would it?

A. Yes sir.

Mr. KETCHAM: I now offer in evidence these tables marked "A," "B," "C," "D," "A 2," "B 2."

The said tables so offered were admitted in evidence and same will be found in the words and figures following, to-wit:

(See next page.)

2102 TABLE "A."

Construction Account, Nov. 30, 1856, $1,611,450; Net Total Earnings as Asked upon X Ex., as Revised and Corrected.

Construction 1847		$3,500.39	
	Interest to Dec. 31, 1848		350.04
" 1848		1,436.55	
		4,936.94	
	" " " " 1849		493.69
" 1849		85,214.02	
		90,150.96	
	" " " " 1850		9,015.10
" 1850		131,608.76	
		221,759.72	
	" " " " 1851		22,175.97
" 1851		689,948.54	
		911,708.26	
	" " " " 1852		91,170.83
" 1852		413,190.60	
		1,324,898.86	
	" " " " 1853		132,489.89
" 1853		110,627.09	
		1,435,525.95	
	" " " " 1854		143,552.59

2103 Am't for'd		1,435,525.95	
Construction 1854		29,795.96	
		1,465,321.91	
" Int. to Dec. 31, 1855			146,532.19
" 1855		36,844.78	
		1,502,166.69	
" 11 mos. Nov. 30, 1856.			137,698.61
" 1856		109,283.31	
		1,611,450.00	
Add accrued interest to Nov. 30, 1856		683,478.91	683,478.91
Total construction & int. to Nov. 30, 1856		2,294,928.91	
Deduct total net earnings as follows:			
1851	2,420.93		
1852	45,860.05		
1853	63,395.71		
1854	114,537.55		
1855	148,327.32		
1856	359,654.06		
		734,195.62	
Bal. construction & int., less earnings Nov. 30, 1856.		1,560,733.29	
Interest to Nov. 30, 1857.		156,073.33	
		1,716,806.62	
Earnings 1857		187,730.17	
		1,529,076.45	
Am't for'd			1,529,076.45
2104 Am't for'd			$1,529,076.45
Int. to Nov. 30, 1858			152,907.64
			1,681,984.09
Earnings 1858			161,519.43
			1,520,464.66
" " " 1859			152,046.47
			1,672,511.13
" 1859			160,082.62
			1,512,426.51
" " " 1860			151,242.85
			1,663,671.36
" 1860			191,366.82
			1,472,304.54
" " " 1861			147,230.45
			1,619,534.99
" 1861			189,233.74
			1,430,301.25
" " " 1862			143,030.12
			1,573,331.37

"	1862		352,287.44
	" " " 1863		1,221,043.93 122,104.39
"	1863		1,343,148.32 316,570.48
	Total " 1863		1,026,577.84
	For'd		1,026,577.84
105	Int. to Nov. 30, 1864		102,657.78
			1,129,235.62
Earnings 1864			393,637.38
	" " " " 1865		735,598.24 73,559.82
"	1865		809,158.06 362,536.27
	" " " " 1866		446,621.79 44,662.18
"	1866		491,283.97 326,913.30
	" " " " 1867		164,370.67 16,437.07
Bal. construction & int			180,807.74
Earnings 1867		468,641.71	
Deduct bal. above		180,807.74	
	Due the State Nov. 30, 1867		287,833.97
Earnings 1868			430,443.38
"	1869		366,199.52
"	1870		278,720.54
"	1871		336,988.96
"	1872		296,589.00
"	1873 to Jan. 15		103,403.26
	For'd		2,100,178.63
2106	For'd		2,100,178.63
Deduct 15 % on $1,611,450 for 1868-1869-1870-1871-1872 and 1½ mos. to Jan. 15, '73, 5⅛ years			1,238,802.19
	Am't due the State Jan. 15, 1873		861,376.44

Note No. 1.—State and County Taxes Deducted from Earnings in the Above Table.

Taxes 1853		4,427.89	
	Int. to Dec. 31, 1854		442.79
"	1854	3,823.17	
		8,251.06	
	" " " " 1855		825.11
"	1855	6,084.31	
		14,335.37	
	11 mos. Nov. 30, 1856		1,314.08

"	1856		629.06	
	" " " " 1857		14,964.43	
"	1857		6,255.85	1,496.44
	" " " " 1858		21,220.28	
"	1858		7,252.28	2,122.03
	" " " " 1859		28,472.56	
"	1859		7,645.67	2,847.26
	" " " " 1860		36,118.23	
Taxes	1860		5,738.87	3,611.82
2107	Int. to Nov. 30, 1861		41,857.10	4,185.71
Taxes	1861		5,452.66	
	" " 1862		47,309.76	
"	1862		4,910.38	4,730.98
	" " 1863		52,220.14	
"	1863		5,805.32	5,222.01
	" " 1864			5,802.55
"	1864		58,025.46 6,917.10	32,600.78
	" " 1865		64,942.56	
"	1865		26,602.65	6,494.26
	" " 1866		91,545.21	
"	1866		7,435.75	9,154.52
	" " 1867		98,980.96	9,898.10
"	1867		18,439.33	58,147.66
"	1868		17,453.11	
"	1869		15,626.18	
"	1870		15,721.99	
"	1871		14,680.74	
2108	Total taxes 1853 to 1871 inclusive			180,902.31
	Add interest to 1867			58,147.66
				239,049.97

It is impossible to give from the books the taxes of 1872 and the proportion of 1873. they would amount to about $18,000.

Note No. 2.—Expenditures for Branches & Sidings, Double Track, Equipment, Extension to State Line & Construction & Equipment, 1872, from 1868 to 1872, Inclusive.

1868.		
Branches & sidings (Ex. 50)		29,283.69
1869.		
Branches & sidings (Ex. 50)	122,695.38	
Double track (Ex. 55)	17,884.41	
Extension (Ex. 55)	207,406 86	
		347,986.65
1870.		
Branches & sidings (Ex. 50)	82,727.60	
Double track (Ex. 55)	7,190 94	
Equipment (Ex. 55)	138,139.83	
Extension (Ex. 55)	240,359.57	
		468,417.94
2109		
1871.		
Branches & sidings (Ex. 50)	46,355.27	
Extension (Ex. 55)	1,094.28	
		47,449.55
1872.		
Construction & equipment a/c (Ex. 55)		231,125.56
		1,124.263.39
Mortgage bonds outstanding Jan. 17, 1873		800,000.00
Balance		324,263.39

2110 TABLE "A" 2."

Construction Nov. 30, 1856	1,611,450.00	
Less interest & discount	149,577.58	
		1,461,872.42

Net total earnings—as revised and corrected after X examination.

Construction 1847	3,500.39	
Int. Dec. 31, 1848		350.04
" 1848	1,436.55	
	4,936.94	
" " " 1849		493.69
" 1849	85,214.02	
	90,150.96	
" " " 1850		9,015.10
" 1850	131,608.76	
	221,759.72	
" " " 1851		22,175.97
" 1851	689,948.54	
	911,708.26	
" " " 1852		91,170.83
" 1852	413,190.60	
	1,324,898.86	
Deduct int. & discount charged to construction	149,577.58	
	1,175,321.28	
Int. to Dec. 31, 1853		117,532.13
Construction 1853	110,627.09	
	1,285,948.37	

2111 For'd	1,285,948.37	
Int. to Dec. 31, 1854		128,594.84
Construction 1854	29,795.96	
	1,315,744.33	
" " 1855		131,574.43
" 1855	36,844.78	
	1,352,589.11	
(11 mos.) Nov. 30, 1856		123,987.33
	$1,352,589.11	624,894.36
Add accrued int. to Nov. 30, 1856	624,894.36	
Construction 1856	109,283.31	
Construction & accrued int., to Nov. 30, 1856	2,086,766.78	

Deduct net total earnings as follows,

Earnings 1851	2,420.93	
" 1852	45,860.05	
" 1853	63,395.71	
" 1854	114,537.55	
" 1855	148,327.32	
" 1856	359,654.06	
		734,195.62
	1,352,571.16	
Int. to Nov. 30, 1857		135,257.12
	1,487,828.28	
Earnings 1857		187,730.17
	1,300,098.11	
" " 1858		130,009.81
For'd	$1,430,107.92	
2112 For'd	$1,430,107.92	
Earnings 1858		161,519.43
	1,268,588.49	
Int. to Nov. 30, 1859		126,858.85
	1,395,447.34	
" 1859		160,082.62
Total to Nov. 30, 1859	1,235,364.72	
Int. to Nov. 30, 1860	123,536.47	
	1,358,901.19	
" 1860		191,366.82
	1,167,534.37	
" " 1861		116,753.44
	1,284,287.81	
" 1861		189,233.74
	1,095,054.07	
" " 1862		109,505.41
	1,204,559.48	

" 1862	352,287.44	
	852,272.04	
" " 1863	85,227.20	
	937,499.24	
" 1863	316,570.48	
	620,928.76	
" " 1864	62,092.88	
	683,021.64	
" 1864	393,637.38	
	289,384.26	
" " 1865	28,938.43	
For'd	318,322.69	
2113 Bal. construction & int. to Nov. 30, 1865	318,322.69	
Earnings 1865		362,536.27
Deduct balance above		318,322.69
Due the State Nov. 30, 1865		44,213.58
Earnings 1866		326,913.30
Earnings 1867		468,641.71
Earnings 1868		430,443.38
" 1869		366,199.52
" 1870		278,720.54
" 1871		336,988.96
" 1872		296,589.00
" 1873		103,403.26
		$2,652,113.25
Deduct 15% on $1,461,872.42 from 1866 to Jan. 17, 1873, 7⅛ years		1,562,376.13
Am't due State January 17, 1873		1,089,737.12

2114 *Note* 1.—*State & County Taxes Deducted from Earnings on Above Table.*

Taxes 1853	4,427.89	
Int. to Dec. 31, 1854		442.79
" 1854	3,823.17	
	8,251.06	
" " 1855		825.11
" 1855	6,084.31	
	14,335.37	
(11 mos.) Nov. 30, 1856		1,314.08
" 1856	629.06	
	14,964.43	
" " 1857		1,496.44
" 1857	6,255.85	
	21,220.28	
" " 1858		2,122.03
" 1858	7,252.28	
	28,472.56	
" " 1859		2,847.26

"	1859	7,645.67	
		36,118.23	
	" " 1860		3,611.82
"	1860	5,738.87	
		41,857.10	
	" " 1861		4,185.71
"	1861	5,452.66	
		47,309.76	
2115	For'd	$47,309.76	
	Int. to Nov. 30, 1862		4,730.98
Taxes	1862	4,910.38	
		52,220.14	
	" " 1863		5,222.01
"	1863	5,805.32	
		58,025.46	
	" " 1864		5,802.55
			32,600.78
"	1864	6,917.10	
		64,942.56	
	" " 1865		6,494.26
			39,095.04

"	1865	26,602.65
"	1866	7,435.75
"	1867	18,439.33
"	1868	17,453.11
"	1869	15,626.18
"	1870	15,721.99
"	1873	14,680.74
Taxes 1853 to 1871 inc.		180,902.31
Add int. to 1865		39,095.04
		$219,997.35

2116 *Note No. 2.—Expenditures for Branches & Sidings, Double Track, Equipment, Extension to State Line & Construction & Equipment, 1872, from 1868 to 1872, Inclusive.*

1868.		
Branches & sidings (Ex. 50)		$29,283.69
1869.		
Branches & sidings (Ex. 50)	122,695.38	
Double track (Ex. 55)	17,884.41	
Extension (Ex. 55)	207,406.86	
		347,986.65
1870.		
Branches & sidings (Ex. 50)	82,727.60	
Double track (Ex. 55)	7,190.94	
Equipment (" ")	138,139.83	
Extension (Ex. 55)	240,359.57	
		468,417.94
1871.		
Branches & sidings (Ex. 50)	46,355.27	
Extension (Ex. 55)	1,094.28	
		47,449.55

1872. Construction & equipment % (Ex. 55)		231,125.56
		$1,124,263.39
Mortgage bonds outstanding Jan. 17, 1873		800,000.00
Balance		$324,263.39

2117 TABLE "B."

Construction Nov. 30, 1862, $1,750,247.81, Net Total Earnings, as Asked upon X Examination, as Revised and Corrected.

Construction 1847		$3,500.39	
	Int. to Dec. 31, 1848		$350.04
" 1848		1,436.55	
		4,936.94	
	" " 1849		493.69
" 1849		85,214.02	
		90,150.96	
	" " 1850		9,015.10
" 1850		131,608.76	
		221,759.72	
	" " 1851		22,175.97
" 1851		689,948.54	
		911,708.26	
	" " 1852		91,170.83
" 1852		413,190.60	
		1,324,898.86	
	" " 1853		132,489.89
" 1853		110,627.09	
		1,435,525.95	
	" " 1854		143,552.59
" 1854		29,795.96	
		1,465,321.91	
2118 For'd		$1,465,321.91	
	Int. to Dec. 31, 1855		146,532.19
Construction 1855		36,844.78	
		1,502,166.69	
	(11, -os.) Nov. 30, 1856		137,698.61
" 1856		109,283.31	
	" 1857		161,145.00
			844,623.91
" 1857		65,108.58	
		1,676,558.58	
Add accrued interest to Nov. 30, 1857		844,623.91	
		2,521,182.49	

Deduct net total earnings as follows:

1851	$2,420.93		
1852	45,860.05		
1853	63,395.71		
1854	114,537.55		
1855	148,327.32		
1856	359,654.06		
1857	187,730.17		
		921,925.79	
			1,599,256.70
Interest to Nov. 30, 1858			159,925.67
Construction 1858			17,942.21
			1,777,124.58
Deduct earnings 1858			161,519.43
			1,615,605.15
2119 For'd			1,615,605.15
Interest to Nov. 30, 1859		161,560.51	
Construction 1859			7,903.70
			1,623,508.85
Interest Nov. 30, 1860		162,350.88	
Construction 1860			16,892.39
			1,640,401.24
Add interest 1859 & 1860			323,911.39
			1,964,312.63
Deduct earnings 1859		160,982.62	
" 1860		191,366.82	
			351,449.44
			1,612,863.19
Interest to Nov. 30, 1861			161,286.32
Construction 1861			8,969.77
			1,783,119.28
Deduct earnings 1861			189,233.74
			1,593,885.54
Interest to Nov. 30, 1862			159,388.55
Construction 1862			21,981.16
			1,775,255.25
Deduct earnings 1862			352,287.44
			1,422,967.81
Interest to Nov. 30, 1863			142,296.78
			1,565,264.59
Deduct earnings 1863			316,570.48
			1,248,694.11
2120 For'd			$1,248,694.11
Interest to Nov. 30, 1864			124,869.41
			1,373,563.52
Deduct earnings 1864			393,637.38
			979,926.14

Int. to Nov. 30, 1865		97,992.61
		1,077,918.75
Deduct earnings 1865		362,536.27
		715,382.48
Int. to Nov. 30, 1866		71,538.25
		786,920 73
Deduct earnings, 1866		326,913.30
		460 007.43
Int. to Nov. 30, 1867		46,000 74
		506.008 17
Deduct earnings 1867		468,641.71
		37,366.46
Int. to Nov. 30, 1868		3,736.65
		41,103.11
Earnings 1868	430,443 38	
Deduct bal. above	41,103 11	
Due the State Nov. 30, 1868	389,340.27	
Add earns. 1869	366,199 52	
" 1870	278,720.54	
" 1871	336,988 96	
" 1872	296,589.00	
" 1873—1½ mos	103.403.26	
For'd	1,771,241.55	
2121 For'd		$1,771,241.55
Deduct 15% on $1,750,247.81 from 1869 to Jan. 17, 1873—4⅛ yrs		1,082,965.83
Am't due the State Jan. 17, 1873		688,275.72

Note 1.—*State & County Taxes Deducted from Earnings in the Above Table.*

Taxes 1853	4,427.89	
Int. to Dec. 31, 1854		442.79
" 1854	3,823 17	
	8,251.06	
" " 1855		825.11
" 1855	6,084.31	
	14,335.37	
(11 mos.) Nov. 30, 1856		1,314.08
" 1856	629.06	
	14,964.43	
" " 1857		1,496.44
" 1857	6,255.85	
	21,220.28	
" " 1858		2,122.03
" 1858	7,252.28	
	28,472.56	
" " 1859		2,847.26

	2For'd	$28,472.56	
Taxes	1859	7,645.67	
		36,118.23	
	Int. to Nov. 30, 1860		3,611.82
"	1860	5,738.87	
		41,857.10	
	" " 1861		4,185.71
"	1861	5,452.66	
		47,309.76	
	" " 1862		4,730.98
"	1862	4,910.38	
		52,220.14	
	" " 1863		5,222.01
"	1863	5,805.32	
	" " 1864		5,802.55
"	1864	6,917.10	32,600.78
		64,942.56	
	" " 1865		6,494.26
"	1865	26,602.65	
		91,545.21	
	" " 1866		9,154.52
"	1866	7,435.75	
		98,980.96	
	" " 1867		9,898.10
"	1867	18,439.33	
		117,420.29	
	" " 1868		11,742.03
	For'd	117,420.29	
2123	Forward	$117,420.29	
Taxes	1868	17,453.11	
"	1869	15,626.18	
"	1870	15,721.99	
"	1871	14,680.74	
Taxes	1853 to 1871 inc	180,902.31	69,889.69
Add interest	to 1868	69,889.69	
		250,792.00	

It is impossible to give from the books the taxes of 1872 and proportion of 1873. The amount would be about $18,000.

2124 *Note No. 2.—Expenditures for Branches and Sidings, Double Track, Equipment Extension to State Line & Construction & Equipment,* 1872, *from* 1868 *to* 1872, *Inclusive.*

1868.			
Branches & sidings	(Ex. 50)		29,283.69
1869.			
Branches & sidings	(Ex. 50)	$122,695.38	
Double track	(Ex. 55)	17,884.41	
Extension	(No. ")	207,406.86	
			347,986.65

1870.		
Branches & sidings (Ex. 50)	82,727.60	
Double track (Ex. 55)	7,190.94	
1870.		
Equipment (Ex. 55)	138,139.83	
Extension (Ex. 55)	240,359.57	468,417.94
1871.		
Branches & sidings (Ex. 50)	46,355.27	
2125		
Extension (Ex. 55)	1,094.28	47,449.55
1872.		
Construction & equipment account (Ex. 55)		231,125.56
		$1,124,263.39
Mortgage bonds outstanding Jan. 17, 1873		800,000.00
Balance		$324,263.39

2126 TABLE "B"-2.

Construction Nov. 30, 1862	$1,750,247.81	
Less interest & discount	149,577.58	1,600,670.23
Net total earnings—as revised and corrected after X examination;		
Construction 1847	3,500.39	
Int. to Dec. 31, 1848		350.04
" 1848	1,436.55	
	4,936.94	
" " " 1849		493.69
" 1849	85,214.02	
	90,150.96	
" " " 1850		9,015.10
" 1850	131,608.76	
	221,759.72	
" " " 1851		22,175.97
" 1851	689,948.54	
	911,708.26	
" " " 1852		91,170.83
" 1852	413,190 60	
	1,324,898.86	
Deduct int. & disc't cha'g'd to construction	149,577.58	
	1,175,321.28	
Int. to Dec. 31, 1853		117,532.13
Construction 1853	110,627.09	
For'd	1,285,948.37	
2127 For'd	1,285,948.37	
Int. to Dec. 31, 1854		128,594.84
Construction 1854	29,795.96	
	1,315,744.33	
" " 1855		131,574.43

" 1855		36,844.78	
		1,352,589.11	
(11 mos.) " 30, 1856			123,987.33
" 1856		109,283.31	
			624,894.36
Add accrued int. to Nov. 30, 1856		624,894.36	
Total construction & int. "		2,086,766.78	

Deduct net total earnings as follows:

Earnings 1851	2,420.93	
" 1852	45,860.05	
" 1853	63,395.71	
" 1854	114,537.55	
" 1855	148,327.32	
" 1856	359,654.06	
		734,195.62
		1,352,571.16
Int. to Nov. 30, 1857		135,257.12
Construction 1857		65,108.58
		1,552,936.86
Earnings 1857		187,730.17
		1,365,206.69
Int. to Nov. 30, 1858		136,520.67
Construction 1858		17,942.21
For'd		1,519,669.57
2128		$1,519,669.57
Earnings 1858		161,519.43
		1,358,150.14
Int. to Nov. 30, 1859		135,815.01
Construction, 1859		7,903.70
		1,501,868.85
" 1859		160,082.62
		1,341,786.23
Interest, 1860		134,178.62
Construction, 1860		16,892.39
		1,492,857.24
" 1860		191,366.82
		1,301,490.42
Interest, 1861		130,149.04
Construction, 1861		8,969.77
		1,440,609.23
" 1861		189,233.74
		1,251,375.49
Interest, 1862		125,137.55
Construction, 1862		21,981.16
		1,398,494.20

" 1862	352,287.44	
	1,046,206.76	
Interest, 1863	104,620.68	
	1,150,827.44	
" 1863	316,570.48	
For'd	834,256.96	
2129 For'd	$834,256.96	
Int., 1864	83,425.70	
	917,682.66	
Earnings 1864	393,637.38	
	524,045.28	
" 1865	52,404.53	
	576,449.81	
" 1865	362,536.27	
	213,913.54	
" 1866	21,391.35	
Bal. construction & int. to Nov. 30, 1866	235,304.89	
Earnings 1866		326,913.30
Deduct balance above		235,304.89
		91,608.41
Earnings 1867		468,641.71
" 1868		430,443.38
" 1869		366,199.52
" 1870		278,720.54
" 1871		336,988.96
" 1872		296,589.00
" 1873		103,403.26
		$2,372,594.78
Deduct 15 % on $1,600,670.23 from 1867 to 1873—6⅛ years		1,470,615.75
Am't due State Jan. 17, 1873		901,979.03

2130 *Note* 1.—*State & County Taxes Deducted from Earnings on Above Table.*

Taxes 1853	$4,427.89	
Int. to Dec. 31, 1854	3,823.17	442.79
" 1854	8,251.06	
" 1855	6,084.31	825.11
" 1855	14,335.37	
(11 mos.) Nov. 30, 1856	629.06	1,314.08
" 1856	14,964.43	
" 1857	6,255.85	1,496.44
" 1857	21,220.28	
" 1858		2,122.03

"	1858	7,252.28	
		28,472.56	
	" 1859		2,847.26
"	1859	7,645.67	
		36,118.23	
	" 1860		3,611.82
"	1860	5,738.87	
	Am'ts forward	41,857.10	12,659.53
2131	Am'ts forward	41,857.10	12,659.53
	Int. to —, 1861		4,185.71
Taxes	1861	5,452.66	
		47,309.76	
	" 1862		4,730.98
"	1862	4,910.38	
		52,220.14	
	" 1863		5,222.01
"	1863	5,805.32	
		58,025.46	
	" 1864		5,802.55
"	1864	6,917.10	
		64,942.56	
	" 1865		6,494.26
"	1865	26,602.65	
		91,545.21	
	" 1866		9,154.52
"	1866	7,435.75	
"	1867	18,439.33	
"	1868	17,453.11	
"	1869	15,626.18	
"	1870	15,721.99	
"	1871	14,680.74	
Taxes	1853 to 1871 inc.	180,902.31	48,249.56
Add int. to	1866	48,249.56	
		239,151.87	

2132 *Note No. 2. Expenditures for Branches & Sidings, Double Track, Equipment, Extension to State Line & Construction & Equipment, 1872, from 1868 to 1872, Inclusive.*

	1868.		
Branches & sidings (Ex. 50)			29,283.69
	1869.		
Branches & sidings (Ex. 50)		122,695.38	
Double track (Ex. 55)		17,884.41	
Extension (Ex. 55)		207,406.86	
			347,986.65
	1870.		
Branches & sidings (Ex. 50)		82,727.60	
Double track (Ex. 55)		7,190.94	
Equipment (Ex. 55)		138,139.83	
Extension (Ex. 55)		240,359.57	
			468,417.94

1871.		
Branches & sidings (Ex. 50)	46,355.27	
Extension (Ex. 55)	1,094.28	47,449.55
1872.		
Construction & equipment % (Ex. 55)		231,125.56
		$1,124,263.39
Mortgage bonds outstanding Jan. 17, 1873		800,000.00
Balance		$324,263.39

2133

TABLE "C."

Investment by the Stockholders $1,216,690.05 *and Dividends Declared.*

Invested 1847	$2,411.00	
Int. to Dec. 31, 1848	5,185.00	$241.10
" 1848	7,596.00	
" " " 1849	51,990.00	759.60
" 1849	59,586.00	
" " " 1850	148,428.71	5,958.60
" 1850	208,014.71	
" " " 1851	173,465.81	20,801.47
" 1851	381,480.52	
" " " 1852	225,509.81	38,148.05
" 1852	606,990.33	
" " " 1853	63,642.14	60,699.03
" 1853	670,632.47	
" " " 1854	168,568.80	67,063.25
" 1854	839,201.27	
" " " 1855	47,031.97	83,920.13
" 1855		
For'd	886,233.24	

2134

Investment, &c., Cont.

For'd	$886,233.24	
(11 mos.) Nov. 30, 1856		81,238.04
Invested 1856	108,319.77	
		358,829.27
	994,553.01	
Add accrued int. to Nov. 30, 1856	358,829.27	
Total investment & int. Nov. 30, 1856	$1,353,382.28	$1,353,382.28

Deduct dividends as follows:

Dividends 1853	$51,004.73	
1854	74,201.00	
1855	93,645.00	
1856	179,052.00	
" " (stock)	211,600.00	
		609,502.73
Bal. investment Nov. 30, 1866		743,879.55
Int. to Nov. 30, 1857		74,387.95
Investment "		48,174.30
		866,441.80
Dividends 1857		163,374.00
		703,067.80
Int. to Nov. 30, 1858		70,306.78
Investment "		13,381.75
		786,756.33
Dividends 1858		137,645.00
		649,111.33
Int. to Nov. 30, 1859		64,911.13
Investment "		4,460.58
For'd		718,483.04
2135 Am't for'd		718,483.04
Dividends 1859		137,895 00
		580,588.04
Int. to Nov. 30, 1860		58,058.80
Investment—nothing.		
		638,646.84
Dividends 1860		138,145.00
		500,501.84
Int. to Nov. 30, 1861		50,050.18
Investment—nothing.		
		550,552.02
Dividends 1861		138,145.00
		412,407.02
Int. to Nov. 30, 1862		41,240.70
Investment "		52,634.88
		506,282.60
Dividends 1862		173,169.69
		333,112.91
Int. to Nov. 30, 1863		33,311.29
Investment		68,692.98
		435,117.18
Dividends		201,761.30
		233,355.88
Int. to Nov. 30, 1864		23,335.59
Investment "		5,352.70
Bal. investment & int. Nov. 30, 1864		262,044.17

Dividends 1864		335,646.09
" " (stock)		376,700.00
For'd		712,346.09
2136 For'd		712,346.09
Deduct bal. investment above		262,044.17
Am't due State Nov. 30, 1864		450,301.92
Dividends 1865	243,050.52	
Deduct investment, 1865	24,979.27	218,071.25
Dividends 1866	247,345 23	
Deduct investment 1866	4,460.58	242,884.65
Dividends 1867		292,253.70
" 1868		251,134.60
" 1869		251,134.60
" 1870		244,695.38
" 1871		244,695.38
" 1872		239,077.11
" 1873, 1½ mos.—⅛		29,822.25
		2,464,070.84
Deduct 15 % on $1,216,690.05 from 1867 to Jan. 17, 1873, 6⅛ yrs		1,117,834.00
Bal. due the State Jan. 17, 1873		1,346,236.84

2137 *Note No. 2.—Expenditures for Branches & Sidings, Double Track, Equipment, Extension to State Line, & Construction & Equipment* 1872, *from* 1868 *to* 1872, *Inclusive.*

1868.		
Branches & sidings (Ex. 50)		$29,283.69
1869.		
Branches & sidings (Ex. 50)	$122,695.38	
Double track (Ex. 55)	17,884.41	
Extension (")	207,406.86	347,986.65
1870.		
Branches & sidings (Ex. 50)	82,727.60	
Double track (Ex. 55)	7,190.94	
Equipment (Ex. 55)	138,139.83	
Extension (Ex. 55)	240,359.57	468,417.94
1871.		
Branches & sidings (Ex. 50)	46,355.27	
Extension (Ex. 55)	1,094.28	47,449.55
1872.		
Construction & equipment a/c (Ex. 55)		231,125.56
		$1,124,263.39
Mortgage bonds outstanding Jan. 17, 1873		800,000.00
Balance		$324,263.39

2138 TABLE "D."

Investment by the Stockholders, $1,216,690.05, *and Net Total Earnings, as Asked upon X Examination, and as Revised and Corrected.*

Invested 1847		$2,411.00	
Int. to Dec. 30, 1848			$241.10
" 1848		5,185.00	
		7,596.00	
" " 1849			759.60
" 1849		51,990.00	
		59,586.00	
" " 1850			5,958.60
" 1850		148,428.71	
		208,014.71	
" " 1851			20,801.47
" 1851		173,465.81	
		381,480.52	
" " 1852			38,148.05
" 1852		225,509.81	
		606,990.33	
" " 1853			60,699.03
" 1853		63,642.14	
		670,632.47	
" " 1854			67,063.25
" 1854		168,568.80	
		839,201.27	193,671.10
For'd		839,201.27	
2139 Forward		839,201.27	
Add accrued int. to Dec. 31, 1854		193,671.10	
		$1,032,872.37	
Deduct earnings 1851	$2,420.93		
1852	45,860.05		
1853	63,395.71		
1854	114,537.55		
		226,214.24	
Bal. investment & int. to Dec. 31, 1854		806,658.13	
Int. to Dec. 31, 1855		80,665.81	
Invested		47,031.97	
		934,355.91	
Earnings 1855		148,327.32	
		786,028.59	
(11 mos.) int. to Nov. 30, 1856		72,052.62	
Invested		108,319.77	
		966,400.98	
Earnings 1856		359,654.06	
		606,746.92	
Int. to Nov. 30, 1857		60,674.69	
Investment		48,174.30	
		715,595.91	

Earnings 1857	187,730.17	
	527,865.74	
Int. to Nov. 30, 1858	52,786.57	
Invested	13,381.75	
	594,034.06	
For'd		
	$594,034.06	
2140 For'd	161,519.43	
Earnings 1858		
	432,514.63	
Int. to Nov. 30, 1859	43,251.46	
Invested	4,460.58	
	480,226.67	
Earnings 1859	160,082.62	
	320,144.05	
Int. to Nov. 30, 1860	32,014.40	
Invested 1860 nothing.		
	352,158.45	
Earnings 1860	191,366.82	
	160,791.63	
Int. to Nov. 30, 1861	16,079.16	
	176,870.79	
Invested 1861, nothing.		
Earnings 1861		$189,233.74
Deduct balance above		176,870.79
		12,362 95
Earnings 1862	352,287.44	
Invested 1862	52,634.88	
		299.652 56
Earnings 1863	316,570.48	
" 1863	68,692.98	
		247,877.50
Earnings 1864	393,637.38	
" 1864	5,352 70	
		388,284.68
" 1865	362,536.27	
" 1865	24,979.27	
		337,557.00
" 1866 For'd	326,913.30	
	$326,913.30	
2141 For'd	4,460.58	
Invested 1866		$322,452.72
Earnings 1867		468,641.71
" 1868		430,443.38
" 1869		366,199 52
" 1870		278,720.54
" 1871		336,988.96
" 1872		296,589.00
" 1873		103,403.26
		$3,889,173.78
Deduct 15% on $1,216,690.05 from 1867 to Jan. 17, 1873, incl.—6½ yrs.		1,117,834.00
Bal. due State Jan. 17, 1873		2,771,339.78

2142 *Note* 1.—*State and County Taxes Deducted from Earnings in Above Table.*

Taxes 1853	$4,427.89	
Int. to Dec. 31, 1854		$442.79
" 1854	3,823.17	
	8,251.06	
" " 1855		825.11
" 1855	6,084.31	
	14,335.37	
(11 mos.) int. to Nov. 30, 1856		1,314.08
" 1856	629.06	
	14,964.43	
" " 1857		1,496.44
" 1857	6,255.85	
	21,220.28	
" " 1858		2,122.03
" 1858	7,252.28	
	28,472.56	
" " 1859		2,847.26
" 1859	7,645.67	
	36,118.23	
" " 1860		3,611.82
" 1860	5,738.87	
	41,857.10	
" " 1861		4,185.71
For'd		16,845.24

2143 *Note* 1. *Continued.*

For'd		$16,845.24
Taxes 1861	5,452.66	
" 1862	4,910.38	
" 1863	5,805.32	
" 1864	6,917.10	
" 1865	26,602 65	
" 1866	7,435.75	
" 1867	18,439.33	
" 1868	17,453.11	
" 1869	15,626.18	
" 1870	15,721.99	
" 1871	14,680.74	
Total taxes 1853 to 1871 inc.	$180.902 31	
Add interest to 1861	16,845 24	
	$197,747.55	

It is impossible to give from the books the taxes of 1872 and the proportion of 1873. They would amount to about $18,000.00.

2144 *Note No. 2.—Expenditures for Branches & Sidings, Double Track, Equipment, Extension to State Line, & Construction & Equipment, 1872, from 1868 to 1872, Inclusive.*

1868.		
Branches & sidings (Ex. 50)		$29,283.69
1869.		
Branches & sidings (Ex. 50)	$122,695.38	
Double track (Ex. 55)	17,884.41	
Extension (Ex. 55)	207,406.86	
		347,986.65
1870.		
Branches & sidings (Ex. 50)	82,727 60	
Double track (Ex. 55)	7,190.94	
Equipment (Ex. 55)	138,139.83	
Extension (Ex. 55)	240,359.57	
		468,417.94
1871.		
Branches & sidings (Ex. 50)	46,355.27	
Extension (Ex. 55)	1,094 28	
		47,449.55
1872.		
Construction & eqnipment ac. (Ex. 55)		231,125.56
		$1,124.263.39
Mortgage bonds outstanding Jan. 17, 1873		800.000.00
Balance		$324,263.39

2145 Mr. KETCHAM: Now I will offer in evidence this table "E," earnings other than transportation.

The said table, so offered, was admitted in evidence, and the same will be found in the words and figures following, to-wit:—

(See next page)

2146 TABLE "E."

Earnings Other than Transportation from Interest, Profit & Loss, and Surplus, Revised.

1851	Profit & loss			$859 35
1856	" "			17.260 25
1857	" "			4,857 12
1858	" "			374.89
1860	" "			171.75
1861	" "		426.25	
			7,367.50	
	Surplus			7,793.75
			4,832.53	
1862	Int.		6,797 70	
	P. & L.		8,423.00	
	Surplus			20,053.23
1863	P. & L.	1,726.50		
	Surplus	11,764.00		
		13,490.50		
	Less loss on St. L. A. & T. H. bonds	6,651.85		
			6,838.65	
	Int. on St. L. A. & T. H. bonds (Ex.17)		2,204.68	
				9,043.33

1864	P. & L.		14,715.34	
	Surplus		25,286.04	
				40,001.38
1865	Interest		544.07	
	Surplus		20,285.84	
				20,829.91
1866	Interest		6,286.26	
	P. & L.		4,359.76	
	Surplus		21,310.50	
				31,956.52
2147				
1867	Interest		5,795.11	
	P. & L.		3,169.22	
	Surplus		50,061.96	
				59,026.29
1868	Interest		2,081.50	
	P. & L.		20,678.35	
	Surplus ($2,547.55 see Ex. 20)		63,664.64	
				86,424.49
1869	Interest		1,857.25	
	P. & L.	11,260.00		
	Less loss on C. & I. bonds	8,173.75		
			3,086.25	
	Surplus		61,908.11	
				66,851.61
1870	P. & L.		2,906.00	
	Surplus		81,094.04	
				84,000.04
1871	P. & L.		3,112.03	
	Surplus		76,525.15	
				79,637.18
1872	Interest		5,934.47	
	P. & L.		69,402.00	
				75,336.47
1873	" R. E sold		12,750.00	
	Interest, stocks & bonds Ex. 41		53,324.49	
	½ div., on T. H. & I. stock—1873		5,229.00	
	U. S. military trans. Ex. 41		4,631.81	75,935.30
				681,412.86

2148 Re-cross examination.

Questions by JOHN G. WILLIAMS, Esq.:

Q. Have you an itemized statement of the account known as general expenses, for 1872 and 1873?

A. No sir.

Q. You found such an account on the books didn't, you?

A. Such an account appears on the journal.

Q. There is such an account.

A. I think so.

Q. Isn't there one in the ledger?

A. I will have to look. (After examining book) Yes sir, there is.

Q. Did you look at that account to see what taxes were paid in those years?

A. I find the general expense account on the ledger for 1872, which don't disclose anything about taxes.

Q. What does it amount to? What is the total amount expended for general expense?

A. I can foot it up.

Q. Oh, never mind.

A. I can state that the charge to general expense here is accounts payable and machine shop; and referring to the journal the accounts payable is just those words, nothing more, no explanation. I would presume that there was an account kept on some other book as schedule of accounts payable, and turned in to the bookkeeper from time to time but I could not find anything on these books to disclose what those accounts payable were.

2149 Q. You remember that the method of keeping the ccounta was changed that year, don't you?

A. Yes sir.

Q. And the five heads of accounts were these were they not:

Conducting transportation,
Motive power,
Maintainance of way,
Mainetainance of cars,
General expenses.

A. Yes sir.

Q. Do you remember that?

A. Yes sir.

Q. And so far as the journal entries show, taxes may have been included in these general entries.

A. Yes, I have no doubt that is the case, but I can't identify anything that belongs to that entry, accounts payable.

Q. Mr. Duy, please turn to the report of the secretary and auditor for the year ending Nov. 30, 1873, and tell me how much that shows to have been the income from sources other than transportation?

A. Net or gross?

Q. Gross income from sources other than transportation there are two items.

A. Interest on stocks and bonds, $70,162.87

Q. That is "Interest on stocks and bonds, &c." isn't it?

A. Yes sir, stocks and bonds &c., revenue from sundry sources, $11,620.69; total $81,783.56."

Q. Have you checked that with the books to see whether it is correct or not?

2150 A. No, sir, I have not. I don't have any check mark about it. There is a check mark here but it isn't mine, it may be Mr. Cleland's, I don't know.

Q. In addition to all operating expenses and all other expenditures noted by the secretary there, besides construction, what does that report show to have been spent for construction that year?

A. Expenditures for permanent additions to the company's property during the year, and charged to the construction account, are as follows;—do you want the items?

Q. Read the items.

A. Freight cars, $110,616.33, passenger cars, $9,699.57; locomotives, engines, $54,006.79, coal dump at Indianapolis, $21,046.85, engine houses and machine shops, $8,829.42, wood and water stations, $2,283.73, extensions of coal branches, yard and side tracks and switches, $67,582.38, total $274,065.07.

Q. In making up the revenue for the fractional year of 1873, did you take into account any of those expenditures for construction, that you have just read?

A. I don't think I took into account any expenditures for 1873—that class of expenditures; it never was charged to transportation account.

Q. No those construction expenses were not charged to transportation. It shows they were charged to construction. They were expenditures made that year?

A. Yes sir.

Q. And you took no account of them.

2151 A. That is what I say, I went through the transportation account for that year, and if any of those were originally charged to transportation then they were considered.

Q. Well they were not in your original examination, Mr. Duy, if I may be permitted to say so.

A. Well I don't remember about that. I have a transportation account. I checked up the transportation for 1873.

Witness excused.

2152 JOSEPH T. FANNING, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KETCHAM, Esq.:

Q. Will you tell the master your name?

A. Joseph T. Fanning.

Q. Your residence?

A. Indianapolis.

Q. Occupation?

A. Secretary of the Strawboard Manufacturer's Association.

Q. What experience have you had in the examination of railroad books, or as railroad auditor?

A. I was four years employed in the auditor's office of the Belt Railroad and Stockyard Company.

Q. What other experience have you had in the keeping of books, whether public or private?

A. I was two years in the city clerk's office and kept the books of that office during that time I was about two years deputy auditor of Marion county, acting as clerk of the commissioner's court, kept the accounts of the board, there, all the allowances, and drew all the warrants and work pertaining to that position, after that I was four years and a half deputy auditor of State and had charge of the books of that office.

Q. Well from your experiences in these various places I will ask you to state to the master whether you regard yourself as
2153 competent to examine books for the purpose of ascertaining what transactions were had, as shown by the books?

A. I believe from the experience I have had that I am competent to examine the accounts of almost any business.

Q. I will ask you if in connection with Mr. Duy and Mr. Cleland, at my instance and solicitation, you examined the books that were submitted to you, that belonged to the Terre Haute and Indianapolis Railroad Company, for the purpose of making exhibits and statements of the condition of the books, and what the road had been doing from 1847 to 1873?

A. I did.

Q. I will ask you if in making those exhibits or statements they were prepared with your knowledge and were honestly prepared in order to exhibit the true state of facts as shown by those books?

A. They were.

Witness excused.

2154 Mr. KETCHAM: Now, if the master please, there is one matter about which I may desire to examine Mr. Clelland upon his return; he is absent from the city, at Cincinnati, and we cannot get him here at this time but hope to get him on Saturday or next week. He is open however to cross examination. He was examined while here and has never been cross-examined.

Mr. WILLIAMS: We have no desire to cross-examine him.

Mr. KETCHAM: With that exce-tion and unless we have overlooked something else, upon which we will ask the indulgence of the gentlemen on the other side, we will state that we rest.

And the plaintiff here rested.

Thereupon the defendant, to maintain the issues on its behalf, offered and introduced the following evidence to-wit:

JOHN B. BRITTAIN, a witness called on behalf of the defendant, being first duly sworn testified as follows:—

Direct examination.

Questions by JOHN WILLIAMS, Esq.:

A. Please state your name?

Q. John B. Brittain.

Q. Where do you reside?

A. In Washington, Pennsylvania, near Pittsburg.

2155 Q. In what business are you?

A. I am in the accounting department of the Pennsylvania Company, and the P. C. C. & St. L. Railway Co.

Q. How long have you been in that department?

A. Since April 2, 1872.

Q. Have you made a statement on the basis of the books of the Terre Haute and Indianapolis Railroad Company, as they stand,

showing the sum expended each year in construction, the interest thereon, at the close of each year, and the total principal and interest, at the close of each year?

A. I have.

Q. How did you get the items of expenditure—where did you take them from?

A. From the testimony in this case.

Q. Does that statement show the pages of the evidence from which the items are taken?

A. Yes sir.

Q. Please look at the statement handed you, and say whether or not it is the one you have made?

A. Yes sir, that is the statement—typewritten statement made from the original figures, which I prepared.

Q. Are the computations of interest and the other computations made there, correct, as you believe?

A. They are.

Q. What is the total amount of the expenditures shown between 1847 and 1873?

A. To January 17, 1873——

Mr. KETCHAM: Your honor we object to this question for
2156 the reason that it is not material what was expended for construction after the year 1862, with a single exception, perhaps, and that is not material as to this question, and that is as to the extension to the State line—for the reason that under the charter of the defendant company it was specifically and in terms provided that the time within which the construction was to be made, expired within fifteen years after the commencement of the construction, and that that time expired, upon all the evidence in the case and the facts in the case, in 1862, and therefore it is not material what was expended, or whether anything was expended for construction after the year 1862.

The MASTER: It may go in subject to the objection.

To which ruling the plaintiff by counsel at the time excepted.

A. The amount was $2,807,313.79.

Q. Computing the interest on it at ten per cent. from the date of expenditure, what did the interest amount to?

A. The interest aggregated for that period, $3,743,085.33

Q. And what was the total aggregate of interest and principal?

A. $6,550,399.12.

2157 Mr. WILLIAMS: I offer this statement in evidence, if the master please, and ask that it be made part of Mr. Brittain's testimony.

The WITNESS: I will explain more specifically the expenditure for each year, down to January, 1873.

The said statement so offered was admitted in evidence, was marked Exhibit No. 58, the same being in the words and figures following, to-wit:

(See next page.)

2158 (EXHIBIT No. 58.)

Statement No. 1.

Made on basis of books as they stand and showing the sum expended each year in construction and equipment, the interest thereon at the close of each year, and the total of principal and interest at close of each year.

2159 *Statement No. 1.*

Made on basis of books as they stand and showing the sum expended each year in construction and equipment, the interest thereon at the close of each year, and the total of principal and interest at close of each year.

Evidence.	Year.	Expenditure.	Interest.	Total expenditure and interest at close of each year.
Page 256	1847	$3,500 39		$3,500.39
256	1848	1,436.55	350.04	5,286.98
257, 263	1849	85,214.02	493.69	90,994.69
265, 269	1850	131,608.76	9,015.10	231,618.55
269, 283	1851	689,948.54	22,175.97	943,743.06
283, 298	1852	413,190.60	91,170.83	1,448,104.49
298, 299	1853	110,627.09	132,489.89	1,691,221.47
299, 302	1854	29,795.96	143,552.59	1,864,569.91
302, 303	1855	36,844.78	146,532.19	2,047,946.99
			11 mos.	
303, 306	1856	109,283.31	137,698.61	2,294,928.91
		1,611,450.00		
	1857		161,145.00	2,456,073.91
	1858		161,145.00	2,617,218.91
	1859		161,145 00	2,778,363.91
	1860		161,145.00	2,939,508.91
	1861		161,145.00	3,100,653.91
	1862		161,145.00	3,261,798.91
2160	1863		161,145.00	3,422,943.91
306, 307	1864	376,700.00	161,145.00	3,960,788.91
	1865		198,815.00	4,159,603.91
	1866		198,815.00	4,358,418.91
	1867		198,815.00	4,557,233.91
	1868		198,815.00	4,756,048.91
308	1869	225,291.27	198,815.00	5,180,155.18
308, 309	1870	385,690.94	221,344.13	5,787,190.25
309	1871	1,094.28	259,913.22	6,048,197.75
310	1872	207,087.30	260,022.65	6,515,307.70
To Jan. 17	1873		35,091.42	6,550,399.12
Total		2,807,313.79	3,743,085.33	6,550,399.12

2161 Q. I will ask you if you made a statement, also of the dividends declared each year, and the total net revenue each year.

A. I have made such a statement.

Q. From what basis did you make it.

A. From the basis of the evidence in this case.

Q. And does that statement refer to the pages of the evidence from which you obtained the information?

A. It does.

Q. Look at the statement I now hand you and say please whether or not that is the statement you made?

A. That is the statement I made, or a typewritten copy of the original which I made, and has since been verified against said original.

Q. Is this statement correct?

A. It is, to the best of my knowledge and ability to ascertain the correct figures.

Mr. WILLIAMS: I now offer the statement in evidence if the master please, and ask that it be marked Exhibit No. 59, and made part of Mr. Brittain's testimony.

The said statement, so offered, was admitted in evidence, was marked Exhibit No. 59, and the same will be found in the words and figures following, to-wit:

(See next page.)

2162 (EXHIBIT No. 59.)

Statement No. 2.

Showing dividends and net revenue each year.

2163 *Statement No. 2.*

Showing dividends and net revenue each year.

Evidence pages.	Year.	Dividends.	Evidence pages.	Year.	Net revenue.
428	1853	51,004.73	311–497–499.....	1851	$2,420.93
428.....	1854	74,201.00	313–316.....	1852	45,860.05
428.....	1855	93,645.00	316–320.....	1853	63,395.71
428.....	1856	179,052.00	321–322.....	1854	114,537.55
428.....	1856	Stk. Div. 211,600.00	322–323.....	1855	148,327.32
429.....	1857	163,374.00	323–324–508–509.....	1856	359,654.03
429.....	1858	137,645.00	326–329–509–510.....	1857	187,730.17
429.....	1859	137,895.00	329–330–511–514.....	1858	163,845.24
430.....	1860	138,145.00	330–331–514–515.....	1859	160,904.10
430.....	1861	138,145.00	332–333 449–451–515.....	1860	191,366.82
430.....	1862	170,054.00	333–334–449 451–515–516.....	1861	189,233.74
430.....	1863	195,708.50	334–339 430–516–525 835–839.	1862	348,246.25
430–431	1864	307,876.50	340–346 430–525–530	1863	313,238.33
431.....	1864	Stk. Div. 376,700.00	346–354–431. 432–530–543.....	1864	365,086.71
2164					
433.....	1865	230,898.00	355–361 433–534–536.....	1865	345,338.75
433.....	1866	234,978.00	362–366 433–543–545.....	1866	314,546.07
433.....	1867	277,641.00	366–371 433–546–547.....	1867	454,029.01
433.....	1868	238,578.00	372–382 433–547–557.....	1868	417,886.68
433.....	1868	238,578.00	382–388–433 434–557–568.....	1869	364,964.66
434.....	1870	119.289.00	388–398 434–568–572.....	1870	272,442.19
434.....	1871	357,867.00	398–406 434–572–582.....	1871	364,599.19
434.....	1872	238,578.00	406,416 434–582–588.....	1872	300,511.60
434–436	1873	½ ann'l. 29,822.25 Div.	416–421–844–850.....	1873	To Jan. 61,879.76 17.
Total dividends.....		$4,341,274.98	Total net revenue	.....	$5,550,089.89

2165 Q. Did you prepare a statement showing the method followed in computing or arriving at the statement of the net earnings each year?

A. Yes sir.

Q. From what basis did you make that?

A. From the data furnished by the evidence.

Q. Does that statement also show the pages from which you obtained the data.

A. Yes sir.

Q. Look at the statement I now hand you and state whether or not that is the statement you prepared?

A. Yes sir, that is the typewritten copy verified with the original statement which I prepared.

Q. And is it correct?

A. I believe it to be correct.

Mr. WILLIAMS: I now offer this statement in evidence, if the master please, and ask that it be marked Exhibit No. 60, and made part of Mr. Brittain's testimony.

The statement so offered was admitted in evidence, was marked Exhibit No. 60, the same being in the words and figures following, to-wit:

(See next page.)

2166 (EXHIBIT No. 60.)

Statement No. 3.

Showing computation of annual net revenue on basis of data furnished by the evidence.

2167 *Statement No. 3.*

Showing computation of annual net revenue on basis of data furnished by the evidence.

Year.	Pages of evidence.	Items.	Amount.	Total net revenue.
1851	311	Passenger receipts	$1,561.58	
1851	497–499	Add all other revenue	859.35	
				2,420.93
1852	313–316	Net revenue		45,860.05
1853	316–320	" "		63,395.71
1854	321–322	" "		114,537 55
1855	322–323	" "		148,327.32
1856	323–324	Net transportation rev	342,393.81	
1856	508–509	Add all other revenue	17,260.25	
				359,654.06
1857	326–329	Net transportation rev	182,873.05	
1857	509–511	Add all other revenue	4,857.12	
				187,730.17
1858	329–330	Net transportation rev	161,144.54	
1858	511–513	Add all other rev	2,700.70	
				163,845.24

Statement No. 3--Continued.

Year.	Pages of evidence.	Items.	Amount.	Total net revenue.
1859	330-331	Net transportation rev.....	160,082.62	
1859	514-515	Add all other rev.....	821.48	160,904.10
1860	332-333	Transportation rev.....	193,397.87	
1860	449-450	Less further expenditure.....	2,202.80	
		Net transportation rev.....	191,195.07	
1860	515	Add all other rev.....	171.75	191,366.82
1861	333-334	Transportation rev.....	190,409.76	
1861	450-451	Less further expend.....	8,969.77	
1861	451	Net transportation rev.....	181,439.99	
1861	515-156	Add all other rev.....	7,793.75	189,233.74
2168				
1862	334-340	Trans. rev.....	316,379.21	
1862	338-339	Add int. deducted.....	15,855.00	
1862	834-839	Net trans. rev.....	332,234.21	
1862	516-525	Add all other rev.....	19,127.73	
		Net rev.....	351,361.94	
1862	430	Deduct div. tax.....	3,115.69	348,246.25
1863	340-346	Net trans. rev.....	307,527.15	
1863	525-530	Add all other rev.....	11,764.00	
		Net rev.....	319,291.15	
1863	430	Less div. tax.....	6,052.80	313,238.33
		Amount forward.....	$2,288,760.27	
2174		Amount brought forward.....		2,288,760.27
1864	346-354 & 356	Net transportation rev.....	346,483.49	
		Add interest deducted.....	6,371.43	
1864	530-534 537-543	Add all other revenue.....	40,001.38	
1864	.....	Net revenue.....	392,856.30	
1864	431-432	Less dividend tax.....	27,769.59	365,086.71
1865	355-361	Transportation revenue.....	331,668.10	
1865	839-840	Add interest deducted.....	5,038.26	
1865	356-357	Net transportation rev.....	336,706.36	
1865	534-536	Add all other rev.....	20,829.91	
1865	.....	Net revenue.....	357,536.27	
1865	433	Less dividend tax.....	12,152.52	345,383.75
1866	362-366	Net transportation rev.....	292,938.78	
1866	363	Add interest deducted.....	2,018.00	
1866	.....	Net transportation rev.....	294,956.78	

Statement No. 3—Continued.

Year.	Pages of evidence.	Items.	Amount.	Total net revenue.
1866	543–545	Add all other rev	31,956.52	
1866	.....	Net revenue	326,913 30	
1866	433	Less dividend tax	12,367.23	
				314,367.23
1867	366–371	Net transportation rev	409,615.42	
1867	546–547	Add all other revenue	59,026.29	
1867	.....	Net revenue	468,641.71	
1867	433	Less dividend tax	14,612.70	
				454,029.01
1868	372–382	Net transportation rev	344,018.89	
1868	547–557	Add all other revenue	86,424.49	
2175				
1868	.....	Net rev	430,443.38	
1868	433	Less dividend tax	12,556.70	
				417,886.68
1869	382–388	Net trans. rev	289,347.91	
1869	557–568	Add all other rev	88,173.45	
1869	.....	Net rev	377,521.36	
1869	433–434	Less dividend tax	12,556.70	
				364,964.66
1870	388–398	Net trans. rev	194,720.50	
1870	568–572	Add all other rev	84,000.04	
1870	.....	Net rev	278,720.54	
1870	434	Less dividend tax	6,278.35	
				272,442.19
				4,823,099.34
1871	398–406	Net trans. rev	257,351.78	
1871	572–582	Add all other rev	116,423.48	
1871	.....	Net rev	373,775.26	
1871	434	Less dividends tax	9,176.07	
				364,599.19
1872	406–416	Net trans. rev	221,252.53	
1872	582–588	Add all other rev	79,758.18	
1872	.....	Net rev	301,010.71	
1872	434	Less dividend tax	499.11	
				300,511.60
1873	416–421	Net trans. rev	27,467.96	
1873	844–850	Add all other rev	34,411.80	
				61,879.76
		Total		5,550,089.89

2169 Q. Did you make a statement showing at the close of each year the total expenditures and interest for construction, the total of dividends and the total of net revenues?

A. I made such a statement, showing those totals at the close of each year.

Q. I will ask if the figures contained in that statement which I now hand you, are the same as those which are to be found in your other statements?

A. They are.

Q. That is it is made up from your other statements.

A. Yes sir, and all of these figures may be found in one or the other of these preceding three statements which I have made.

Q. That statement shows the total expenditure and interest to have been what.

A. It shows it to have been $6,550,399.12.

Q. And the total dividends to have been what?

A. $4,341,274.98.

Q. And the total net earnings to have been what?

A. The net revenue?

Q. Yes.

A. $5,550,089.89.

Q. I will call your attention to the fact that on Jan. 17, 1893, the aggregate of dividends did not equal the full sum invested, with interest, nor did the aggregate of net earnings equal that sum. Was there any year from the year 1847, until 1873, when either the aggregate of dividends, or the aggregate of net revenue equaled, that year, the aggregate of the cost of construction, with ten per

2170 centum per annum thereon,—was there any year, between 1847 and 1873, when the aggregate of dividends or the aggregate of net revenue, equaled the aggregate of construction, with ten per cent.?

A. There was no year at the close of which the total dividends, or the total net revenue, equaled the cost of construction equipment, plus ten per cent. per annum thereon, as will be shown by this statement.

Q. Are the computations as shown by that statement correct?

A. They are correct according to my best knowledge and belief.

Mr. WILLIAMS: I now offer this statement in evidence, if the master please, and ask that it be marked Exhibit 61, and made a part of Mr Brittain's testimony.

The said statement, so offered, was admitted in evidence, was marked Exhibit No. 61, and will be found in the words and figures following, to-wit:

2171 EXHIBIT No. 61.

Statement No. 4.

Made on basis of books as they stand and showing at the close of each year the total of expenditure and interest for construction and equipment, of dividends, and the total of net revenue.

2172 *Statement No. 4.*

Made on basis of books as they stand and showing at the close of each year the total of expenditures and interest for construction and equipment, of dividends, and the total of net revenue.

Year.	Construction plus 10 per centum per annum thereon.	Total of dividends.	Total of net revenue.
1847	$3,500.39		
1848	5,286.98		
1849	90,994.69		
1850	231,618.55		
1851	943,743.06	....	$2,420.93
1852	1,448,104.49	.....	48,280.98
1853	1,691,221.47	$51,004 73	111,676.69
1854	1,864,569.91	125,205.73	226,214.24
1855	2,047,946.99	218,850.73	374,541.56
1856	2,294,928.91	609,502.73	734,195.62
1857	2,456,073.91	772,876.73	921,925.79
1858	2,617,218.91	910,521.73	1,085,771.03
1859	2,778,363.91	1,048,416.73	1,246,675.13
1860	2,939,508.91	1,186,561.73	1,438,041.95
1861	3,100,653.91	1,324,706.73	1,627,275.69
1862	3,261,798.91	1,494,760.73	1,975,521.94
1863	3,422,943.91	1,690,469.23	2,288,760.27
1864	3,960,788.91	2,375,045.73	2,653,846.98
1865	4,159,603.91	2,605,943.73	2,999,230.73
1866	4,358,418.91	2,840,921.73	3,313,776.80
1867	4,557,233.91	3,118,562.73	3,767,805.81
1868	4,756,048.91	3,357,140.73	4,185,692.49
2173 1869	5,180,155.18	3,595,718.73	4,550,657.15
1870	5,787,190.25	3,715,007.73	4,823,099.34
1871	6,048,197.75	4,072,874.73	5,187,698.53
1872	6,515,307.70	4,311,452.73	5,488,210.13
To Jan. 17th, 1873	6,550,399.12	4,341,274.98	5,550,089.89

2176 Cross examination.

Questions by W. A. KETCHAM, Esq.:

Q. What is your age?

A. Forty-seven years past.

Q. You went into the counting department of the Pennsylvania Company or some of its branches at about 20 years of age.

A. About 20 years of age.

Q. And you have been in the counting department ever since?

A. Ever since.
Q. And that is all the business you have had?
A. You have said the Pennsylvania Company—I entered the service of the Pittsburg, Cincinnati and St. Louis Company.
Q. You have been an accountant and nothing else, you have never been a lawyer?
A. I have never been a lawyer.
Q. Never had occassion to analyze or weigh evidence until you made these statements?
A. Well yes, I suppose I have had occassion to do some of that kind of work in an accounting way.
Q. In accounting you have taken evidence brought before you, and made up statements on it.
A. Yes sir.
Q. And that is what you have done here?
A. Yes sir.
Q. You have been furnished with a copy of the testimony of Mr. Duy?
A. Yes sir.
2177 Q. And from your understanding of that testimony and what that testimony shows, as it was furnished you, you have made up these various statements.
A. Yes sir.
Q. When did you begin that work?
A. Some time in October.
Q. When did you complete it?
A. I worked at it at various times up to the present date.
Q. When were these completed?
A. The originals of these statements were completed sometime in the latter part of November I think.
Q. And with reference to the evidence that had been furnished you up to that time?
A. With reference to the evidence furnished up to that time, and corrections made thereon, up to the present time.
Q. When were the corrections made?
A. One item of the statement, number three, I believe it is, was made in the statement which is now filed, after my arrival here to-day to merely correct an entry, or a wrong entry of the same amount in a prior—in the original preparation of the statement.
Q. What was the amount that was corrected—what figure was it?
A. It was an item in 1864, where we had deducted interest in stating the net transportation revenue, and afterwards discovered that there was more interest received that year than was paid out, and therefore we had added that interest deducted in this statement.
Q. That was $1,583.00 wasn't it?
2178 A. $6,371.43—the second entry from the top there.
Q. When was this typewritten copy made?
A. Well that typewritten copy was completed to-day.
Q. And were there any other changes on the paper, as you had prepared it?

A. No sir.

Q. That is the only correction that was made?

A. The only correction.

Q. In these totals I notice the first one, Exhibit No. 58, I believe it was, you have added each year ten per cent. interest to the construction so as to arrive at the total construction, of six million and a half is it?

A. About that.

Q. You added ten per cent. upon the construction for that year?

A. On the aggregate construction to the end of that year—the cost of construction.

Q. If one year it was a thousand dollars you added a hundred dollars, and then if the next year it was another thousand dollars, you added two hundred, and if the third year it was five thousand dollars you added seven hundred—is that the way you arrived at it?

A. Well I ascertained the aggregate cost of construction, at the close of each year, and then I added ten per cent. for that year, the next year I ascertained the aggregate cost of construction to

2179 the end of that year, and added ten per cent. to that.

Q. Just as I put it to you—the first year if it was a thousand dollars, you put down a hundred dollars, and if the second year it was two thousand dollars you put down two hundred dollars, and the third year it was five thousand dollars you added seven dollars for interest?

A. Yes sir.

Q. But you gave no credits during all that period on account of any of the earnings?

A. No sir, not in preparing this statement.

Q. Well, none in preparing any statement, either of dividends or anything else.

A. No sir, because I did not understand the time had come when there was anything to give credit for.

Q. That was your theory upon which you were to make those tables?

A. Yes sir.

Q. And that theory—did you evolve that yourself, or did you get that from the instructions of counsel?

A. I got it from my understanding of the reading of the charter under which this suit is brought as I understand it, and in conference with the counsel, of course I was guided to some extent by their ideas of preparing this case.

Witness excused.

2180 Mr. WILLIAMS: Now if the master please, we have some evidence to introduce which is contained in the documentary journals. I have tried to get copies of those journals, and the only ones I can find are in the State library, and the State librarian pre-em-torily refuses to allow me to take them out.

What I wish to introduce is a report of the attorney general for

the two years ending November 6, 1874, and a similar report—or extracts from it rather— of the biennial report of the attorney general for the two years ending November 6, or 7, 1878.

I, personally have made exact copies from the documentary journals, of those two reports, and I will submit those to counsel, and if agreeable I would like to save bringing the librarian here.

My copies show where they are to be found in the documentary journals.

Mr. KETCHAM: If you will let me take those copies, we will have some one compare them and we may be able to agree on that matter.

Mr. WILLIAMS: I offer in evidence now, the agreement between the State of Indiana and the Terre Haute and Indianapolis Railroad Company, which agreement appears in the third paragraph of the answer, of the defendant in this case.

I offer the agreement as it appears in the answer in evidence.

The reply admits the execution of the agreement, as set
2181 out in the answer.

Mr. KETCHAM: Now we object to the introduction in evidence of this agreement, for the reason first, that there was no authority in the attorney general as such, to make any such agreement, and second, that there was no authority in law in the governor, or the lieutenant governor, or the governor and lieutenant governor to approve the agreement, and in the third place, that it appears from the agreement itself, that so far as it was approved it was approved upon the understanding of the governor and lieutenant governor, that it had been executed with the concurrence of the special counsel associated with the attorney general, and there is no evidence that in fact the agreement was made with the concurrence of the associated counsel of the attorney-general, and for a further reason that under the law the attorney general as such, had no control or authority or power, over the proceedings in the nature of a *quo warranto;* that under the laws of Indiana, the entire control, in *quo warranto* proceedings, is with the prosecuting attorneys of the State, and there is no power or authority given, no power conferred upon the attorney general to have any control over or anything to do with *quo warranto* proceedings; that the only claim of authority to be found anywhere is in the joint resolution purporting to have been approved on the 10th of March, 1873, found at page 153 of the revision of 1876, and that under the constitution of the State, laws can only be enacted in the manner prescribed, and that a
2182 joint resolution has not the force or effect of a law; that no law can be originally passed, repealed, modified or set aside in any manner, except by a law passed in conformity with the requirements of the constitution of the State, and that this joint resolution of 1873 was not passed as a law, and does not profess to be a law, but is only a joint resolution, which is held, by the decision in the May case, could not authorize the payment of money, nor could it authorize the forebearance, release or discharge of a claim, and could not amend, or modify the law as it then existed, conferring

upon the prosecuting attorneys the sole power in *quo warranto* proceedings.

The MASTER: As I understand the rule, this evidence must go in, and the exception is taken here, and when the case is finally submitted and I make my finding and report I will consider them and include them in my report at that time.

I presume that when the case is argued, all these matters will be more fully argued on both sides.

That is my understanding of the procedure in these cases.

To which ruling, the plaintiff, by counsel, at the time excepted.

The said *argument*, so offered, is in the words and figures following, to-wit:

2183 In the Owen Circuit Court, October Term, 1874.

THE STATE OF INDIANA *ex Rel.* JOHN C. ROBINSON, Prosecuting Attorney, etc.,
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

The parties to the above cause making the agreement.

The defendant agrees by her attorneys and officers to at any time enter the appearance of the defendant to an action to be instituted by the plaintiff (The State of Indiana) in the superior court of Marion county for the recovery of any money which was due the State or the school fund of the State, under and by virtue of the said company's charter of January 26, 1847, and the amendments thereto.

In consideration of which agreement, the plaintiff and her attorneys and proper officers agrees to suspend further prosecution of said action now pendiag in the Owen circuit court, until the final determination of such action so as aforesaid to be instituted for the recovery of money, and if in said last named action the defendant shall prevail, then the said plaintiff agrees to dismiss said suit in the said Owen circuit court, and if the said plaintiff in the said action to be instituted for money shall prevail the said action in the Owen circuit court shall be dismissed only when the defendant shall have satisfied the judgment so obtained in the latter action
2184 for money, but nothing herein shall be so construed as to compel the dismissal of said suit in the Owen circuit court, until said action so to be instituted shall have been finally tried upon the issues joined between the parties, or it shall be found in framing the issues, and determined by the court, that no right of action exists in favor of the State or the school fund.

And it is further agreed that the agreed statement which was prepared to be and which was in part used in the trial of said cause in the Owen circuit court, may be used as evidence without objection, so far as the same may be competent, in the suit to be brought by the State against said company.

It is further agreed that either party may withdraw the depositions on file in the Owen circuit court in said cause, and *amy* read the same, so far as the same in their subject matter may be found competent.

And that this may be done notwithstanding any order of the Owen circuit court suppressing the same, provided the party so using such depositions shall cause the same to be filed in the court where the case may be pending, twenty days before the day for which said cause is set for trial, but this agreement shall not be construed to prevent either party taking additional depositions of the same or other witnesses.

And it is agreed that if in making up the issues and on the trial of said cause it can be shown under the law and the evidence that is adduced that any money is due to the State or school fund
2185 of the State from said old company or companies, (by whatever name or names) under and by virtue of said charter and amendments thereto and the law and facts as applied thereto, then and in that case the company as now organized shall pay such amount and judgment shall be rendered in said action for money for the sum that may be found due.

Nothing herein contained shall be construed to prevent the defendant from setting up any defense which existed in behalf of said old company prior to the surrender of said old charter.

Indianapolis, October 5, 1874.

J. C. DENNY,
Attorney General, State of Indiana.
TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
By W. R. McKEEN, *President.*
R. W. THOMPSON,
C. F. McNUTT,
THOS. R. COBB,
Attorneys for T. H. & I. R. R. Co.

This agreement made by the attorney general (with the concurrence of his associate counsel, as we understand) we approve.

October 5, 1874.

2186 THOMAS A. HENDRICKS, *Governor.*
LEONIDAS SEXTON,
Lieutenant Governor.

2187 Mr. WILLIAMS: Now we offer in evidence if the master please, a certified copy from the Owen circuit court, all the pleadings and proceedings in that court in the *quo warranto* suit against the Terre Haute and Indianapolis Railroad Company.

Mr. KETCHAM: And to that the State objects for the reason that it nowhere appears that the court obtained jurisdiction of the subject matter of the action, for the further reason that it appears from the record offered, that there was never at any time, any final judgment entered in said cause, and that the proceedings as shown by

the transcript offered in evidence are merely interlocu-ory in their character and do not show the determination of the case, and do not, therefore, to that extent, sustain or tend to sustain the averments of the answer; and for the further reason that the evidence sought to be elicited by such record or transcript, is wholly irrelevant and *and* immaterial and does not show or tend to show any matter or fact sustaining, or tending to sustain the answer, or controverting, or tending to controvert any of the averments of the complaint.

The MASTER: It may go in subject to objection.

Mr. KETCHAM: I reserve an exception to the ruling admitted for the present, or at all, the agreement that was offered a while ago, and this alleged transcript.

2188–2258 The said certified copy of the transcript so offered, was admitted in evidence, the same being in the words and figures following, to-wit:

This was marked Exhibit No. 62.

(See next page.)

2259 Mr. WILLIAMS: I now offer in evidence the complaint filed in the superior court of Marion county by the State of Indiana on the relation of its attorney general, being the complaint in the case referred to in the complaint in the present case.

Mr. KETCHAM: Now to that may it please the master, we desire to object for the reason that it is irrelevant and immaterial to any issue that is presented here, that the complaint is only admissible upon the theory that the cause of action in that case and the cause of action in this case are one and the same, and that it is to be determined by an inspection of the record and that upon the issues made by the court in this cause, which is binding upon your honor, it has been in terms determined that the cause of action in the two cases are not the same, but are different.

The MASTER: I will consider this matter to-night and will pass upon it in the morning.

The hour of five o'clock p. m. having arrived, the hearing was adjourned until to-morrow, Friday, December 22, 1899, at 10 o'clock a. m.

2260 FRIDAY, *December* 22, 1899—Nine o'clock a. m.

The parties met pursuant to adjournment.

Present of counsel for the plaintiff, Messrs. W. A. Ketcham and R. O. Hawkins of counsel for defendant, Messrs. John G. Williams, S. O. Pickens and Lawrence G. Maxwell, Jr.,

The MASTER: If you are ready I will present here my view of the question that was raised yesterday evening.

I do not consider myself bound by the ruling of the court upon the demurrer to the reply to the third paragraph of the answer, to exclude all evidence that may be offered under that paragraph.

While the court discussed in its opinion on that ruling the ques-

tion of a former adjudication, it expresses some doubt as to whether is may be determined on demurrer.

It holds that in any event the reply is good as a denial of the answer, and that the demurrer to the reply must therefore be overruled on that account.

But it is immaterial whether its opinion on the question of former adjudication may be regarded as dicta or not.

2261 It announced therein a rule of evidence by which it would be governed if these proceedings were before it instead of the master; and in acting for the court, and as an officer of it I do not feel at liberty to disregard that rule.

Under the rule of evidence which the court, has announced when the former adjudication is claimed to be founded upon the judgment of a court in sustaining a demurrer to the complaint, the matters that were adjudicated therein, must be ascertained from the pleadings in the record of the case, and their averments cannot be aided by any evidence *aliunde*.

In this view of the case the records and proceedings of the Putnam and the Owen circuit courts are inadmissible here and must be excluded.

But the record and proceedings of the superior court of Marion county in the suit in which it was claimed there was a former adjudication of the matters in controversy here, are admissible here under the third paragraph of the answer.

The court in its opinion also discussed other matters in connection with the question of former adjudication which relate to the legal effect which shall be given the record and proceedings after they are admitted in evidence and it is therefore unnecessary to consider them now.

Mr. WILLIAMS: My impression was that this record from Owen had been put in and marked as Exhibit 62.

2262 It has.

Now under your honor's ruling is that stricken out?

The MASTER: Yes.

Well the question was raised I suppose that memorandum was put on there by the stenographer.

The objection was made as soon as it was offered, as I understand it.

Mr. KETCHAM: Yes.

The MASTER: Then I have ruled upon that objection, and that will be excluded, rather than be stricken out.

Mr. WILLIAMS: Well then with that view of it, in order to get the matter in proper shape, I offer it and ask that it be put in the record, and then an order made excluding it.

In other words I have to make my offer.

The MASTER: I understand that.

I understand that offer was made yesterday evening, and that the objection was made, and that objection was considered and ruled on this morning.

I understand the record shows or ought to show, the offer of it

yesterday evening, if it does not, it may be corrected so as to show it was offered and an objection was made by the plaintiff, and that objection was sustained for the reasons I have given.

Mr. WILLIAMS: I wish it to be reported with the evidence in this case.

2263 Mr. KETCHAM: I think that will be entirely right.

I think it would be proper that the master should report with the evidence the evidence that was excluded,—all of it, so that there may be no question but what the matter will be before the court when it comes up.

We can make an entry about that if there is any question about it.

Mr. WILLIAMS: Please note Mr. Reporter that the defendant excepts to the ruling of the master excluding the transcript from the Owen circuit court.

Mr. KETCHAM: Will you permit a suggestion?

Mr. WILLIAMS: Certainly.

Mr. KETCHAM: And asks that the transcript be certified up by the master at the time of the filing of his report, and by agreement it is so ordered.

The said transcript of proceedings so excluded, being the transcript marked by the reporter at yesterday's session as Exhibit No. Sixty-two, is now marked for further identif-*a*ction as Exhibit Number Sixty-two,—excluded, the same being in the words and figures following to-wit:

2264 Mr. WILLIAMS: Now the defendant introduces——

Mr. KETCHAM: What was offered and admitted was the complaint in the Marion superior court; that is Exhibit 63, is it?

Mr. WILLIAMS: No, it has not been offered.

It has been suggested that probably the shortest and best way to get in the record including this old complaint would be to introduce a copy of the record; a complete copy of the record.

Mr. KETCHAM: Certified transcript of the record?

Mr. WILLIAMS: Yes, and we haven't a certified transcript here.

Mr. KETCHAM: I understand that. We make no question on that Mr. Williams.

Mr. MAXWELL: I suggested to Mr. Williams that the record could show that the defendant offered a transcript of the record in that case, a copy of which is filed and marked Exhibit so and so.

Mr. WILLIAMS: Well we introduce then the record of the judgment and proceedings of the superior court of Marion county, Indiana, in cause No. 10290, State of Indiana on the relation of the Attorney General against The Terre Haute and Indianapolis Railroad Company, the complaint being filed on the 28th day of

2265 May, 1875, the demurrer filed to that complaint by the defendant on the 18th day of June, 1875, and the ruling of the court on that demurrer, March 9th, 1876, and May 29th 1876.

Mr. KETCHAM: Do you offer the summons?

Mr. WILLIAMS: I will, as there was an appearance I don't care.

Mr. MAXWELL: If you offer the record everything in the case will appear won't it?

Mr. PICKENS: Yes.

Mr. WILLIAMS: Yes; I offer the record showing the things recited here and also the summons issued and the return thereon.

Mr. KETCHAM: Now what is the entry of March 9, and the entry of May 29?

Mr. WILLIAMS: March 9th is the ruling on the demurrer and May 29th is the affirmance by the general term.

Mr. KETCHAM: March 9th is the judgment that the State take nothing,—sustaining the demurrer and that the State take nothing by its action, then May 29th is the affirmance in general term.

Mr. WILLIAMS: Yes. We therefore introduce a certified transcript of the complete record in that case and we — leave to file the same and make it a part of the evidence and mark it Exhibit 63.

Mr. KETCHAM: Note our objection and exception to the ruling of the master in admitting this transcript.

2266 The said transcript of the record in cause number 10290 in the superior court of Marion county, Indiana, State of Indiana, on the relation of the Attorney General *vs.* The Terre Haute and Indianapolis Railroad Company, was thereafter delivered to the reporter and the same was marked Exhibit No. 63, Evans reporter, and the same will be found in the words and figures following, to-wit:

(See next page.)

2267 EXHIBIT No. 63. December 22, 1899. (R. Evans, Rep.)

2268–2291 Be it remembered. That among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered &c., in the superior court of the county of Marion State of Indiana, are the following in the cause of

THE STATE OF INDIANA *ex Rel.* THE ATTORNEY General
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD Company. } No. 10290.

And be it also remembered that heretofore, to-wit: on the 28th day of May A. D. 1875, the above named relator, by his attorneys filed in the office of the clerk of said Marion superior court a complaint against the said defendant in the words and figures following:

* * * * * * *

2292 STATE OF INDIANA, } *sct:*
Marion County, }

The State of Indiana to the sheriff of Marion county, Greeting:

You are hereby commanded to summon the Terre Haute and Indianapolis Railroad Company to appear before the judge of the superior court of Marion county, Indiana, on the 8th day of June, 1875, being the 2nd judicial day of the June term, 1875, of said court, which term commences at the court house, in the city of Indianapolis, on the first Monday in said month and last year above named, then and there to answer the complaint of the State of Indiana, and have you then and there this writ.

In testimony whereof, I hereunto subscribe my name, and affix the seal of said superior court, at my office in the city of Indianapolis, the 28th day of May, 1875.

AUSTIN H. BROWN,
[SEAL.] *Clerk Superior Court, Marion County.*

Came to hand May 28th, 1875, and served by reading to J. D. Frailey, conductor of the Terre Haute and Indianapolis Rail-
2293 road Company May 28th, 1875, the president, secretary, treasurer, and superintendent not found within my bailiwick, and the said J. D. Frailey being the highest officer of said railroad company found within my bailiwick, and I offered the said Frailey a copy, which he refused to receive.

ALBERT REISSNER,
Sheriff M. C., Ind.

2294 No. 10,290. The State of Indiana *vs.* The Terre Haute and Indianapolis Railroad Company. Summons. Superior court. To June term, 1875.

Sheriff's fees:

Service	.50
Mileage	.60
Return	.10
Total	$1.20

C. A. Buskirk, *et al.*, attorney- for plaintiff.

2295 And afterwards, to-wit: on the seventh day of the month of June, 1875, being the first judicial day of the general term of said superior court for the month aforesaid, before the Honorable Samuel E. Perkins, Solomon Blair and Horatio C. Mewcomb, judges thereof, the following proceeding was had herein, viz:

Ordered by the court, that cause numbered 10,290 be assigned to room one (1) for trial.

And afterwards, to-wit: on the 18th day of June 1875, being the 11th judicial day of the special term of said Marion superior court for the month of June, 1875, before the Honorable Samuel E. Perkins, judge presiding in said room one (1) the following proceeding was had herein viz:

The defendant comes by counsel and files a demurrer to plaintiff's complaint herein as follows, viz:

Superior Court.

STATE OF INDIANA, } *ss:*
Marion County, }

THE STATE OF INDIANA *ex Rel.* THE ATTORNEY General
vs.
THE TERRE HAUTE AND INDIANAPOLIS Railroad Company.

No. 10290. Demurrer to Complaint.

2296 The defendant demurs to the first paragraph of the plaintiff's complaint herein and for the cause of demurrer shows the – that said paragraph does not state facts sufficient to constitute a good cause of action against defendant.

HARRISON, HINES AND MILLER,
Attorneys for Defendant.

Said defendant, The Terre Haute and Indianapolis Rail Road Company also demurs to the second paragraph of said plaintiff's complaint herein, and for cause of demurrer shows to the court that said paragraph does not state facts sufficient to constitute a good cause of action against defendant.

HARRISON, HINES AND MILLER,
Attorneys for Defendant.

And said defendant The Terre Haute and Indianapolis Rail Road Company, also demurs to the third paragraph of the plaintiff's complaint herein and for cause of demurrer shows to the court that said paragraph does not state facts sufficient to constitute a good cause of action against defendant.

HARRISON, HINES AND MILLER,
Attorneys for Defendant.

And afterwards, to-wit: on the 6th day of March 1876, being the first judicial day of the March term, 1876, of said court, be-
2297 fore the Hon. Sol. Blair, judge presiding in said room one (1), the following proceedings were had herein viz:

Come the parties by counsel, and the court being fully advised, sustains the defendant's demurrer to each paragraph of the plaintiff's complaint herein, to which ruling the plaintiff excepts.

And afterwards, to-wit: on the 9th day of March 1876, being the 4th judicial day of the March term 1876, of said court, before the same hon. judge, the following proceedings were had herein, viz:

Come the parties by counsel, and the plaintiff failing and refusing to amend the complaint herein, and electing to stand by said complaint:

It is now considered and adjudged by the court, that the plaintiff take nothing by said complaint and that the defendant herein go hence without day.

And the plaintiff now prays an appeal of this cause to the general term of this court, which is granted.

And afterwards, to-wit: on the 20th day of April, 1876, being the 11th judicial day of the general term of said Marion superior court for the month of April, 1876, before the Hon. Solomon Blair, Horatio C. Newcomb and Samuel E. Perkins, judges thereof, the fol-
2298 lowing proceedings were had herein, viz:

Comes now the appellant by counsel and files an abstract of the entey docket herein and the following assignment of errors, viz:

STATE OF INDIANA, } ss:
Marion County, }

Superior Court, General Term.

THE STATE OF INDIANA
vs.
INDIANAPOLIS RAILROAD COMPANY. } No. 10290.

1875 June 7. Assigned to room one (1) 24–1
" " 18. Demurrer filed to comp.—27. 72
March 6, 1876. Demurrer sustained & ex. 34, 451
" 9, " Plaintiff refuses to amend,
Judge on demurrers for def't.
Appeal prayed to gen. term, 34. 494

Correct abstract from entry docket in the above entitled cause.

AUSTIN H. BROWN, *Clerk.*

2299 STATE OF INDIANA, } ss:
Marion County, }

Superior Court.

STATE OF INDIANA
vs.
THE TERRE HAUTE AND INDIANAPOLIS Railroad Company.
} No. 10290. Assignment of Errors.

In general term, 1876.

Comes now the appellant and says there is manifest error in the proceedings, ruling and judgment of the court at special term, in this to wit:

First. That the court erred in sustaining the appellee's demurrer to the first paragraph of the appellant's complaint herein.

Second. That the court erred in sustaining the appellant's demurrer to the second paragraph of the appellant's complaint herein.

Third. That the court erred in sustaining the appellee's demurrer to the third paragraph of the appellant's complaint herein.

For these reasons the appellant prays that the judgment of the court below may be reversed.

C. A. BUSKIRK ET AL., *Att'ys.*

2300 The appellee, by her attorneys, comes and says there is no error in the above record.

B. HARRISON,
C. C. HINES,
W. H. H. MILLER,
R. W. THOMPSON,
Attorneys for Appellee.

And afterwards, to-wit: on the 29th day of May, 1876, being the 13th judicial day of the May term, 1876, of said court in general term, before the same hon. judges, the following proceedings were had herein, viz:

Come the parties by counsel and the court, being fully advised in the premises, does, in all things, affirm the judgment rendered in this cause at special term, to the ruling of the court, the said appellant excepts.

It is therefore considered and adjudged by the court, that the judgment herein, rendered at special term, be, and the same is hereby, in all things, affirmed, and that the appellee recover of the appellant, *and that the appellee recover of the appellant* all costs occasioned by the appeal herein.

To which judgment of the court the appellant excepts and prays an appeal to the supreme court of Indiana, which is granted.

SOL. BLAIR,
Presiding Judge.

2301 And afterwards to-wit: on the 19th day of May, 1879, being the — judicial day of the general term of said superior court for said month the following proceedings were had herein, viz:

The opinion of the supreme court in this cause, having been received and duly filed, the same is now ordered to be spread of record and is as follows, viz:

THE STATE OF INDIANA:

In the Supreme Court, November Term, 1878, on the 25th Day of November, 1878.

Hon. George V. Howk, chief justice.

Hon. James L. Worden, Hon. Samuel E. Perkins, Hon. Horace P. Biddle, Hon. William E. Niblack, judges.

2302 In the case of—

THE STATE OF INDIANA *ex Rel.* THE ATTORNEY GENERAL *vs.* THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } No. 10290.

Appeal from the Marion superior court.

Come the parties by their attorneys and the court, being sufficiently advised in the premises, gave the following opinion and judgment pronounced by Biddle, J.

In this case the appelle- had judgment in its favor on a demurrer to the appellant's complaint, in the supreme court, at special term.

An appeal was taken to the general term wherein the judgment was affirmed, from which an appeal was taken to this court.

In the transcript we find this entry:

The appellant files an abstract of the entry docket and the following assignment of errors in this cause. (not on file)

But no assignment of error appears in the transcript, as made at the general term.

In this court the appellant has probably assigned as error, said court in general term erred in affirming the judgment in
2303 special term and also assigns as error, that "the court in special term erred in sustaining the demurrer to each paragraph of the plaintiff's complaint.

This second assignment of error is made too late in this court.

We have frequently decided that we can consider nothing in this court, except the assignments of error made in the supreme court at general term.

This practice is well settled.

Huffman *vs.* The Indianapolis National Bank of Indianapolis, 51, Ind. 394, Selking *vs.* Jones, 52, Ind. 409, Alexander *vs.* The North Western Christian University, 57 Ind. 466, —— *vs.* —— 58 Ind. —; Miller *vs.* The State *ex rel.* Harrington, May term 1878.

There being no assignments of error made at the general term of the superior court, in the transcript no question is presented to this court for decision.

The judgment is affirmed.

On the 16th of December, 1878, a petition for a rehearing was overruled as follows:

BIDDLE *J.*:

On motion to relieve the judgment or for rehearing.

The appellant moves the court to be relieved from judgment in this case, on the grounds of mistake, inadvertance, surprise
2304 and excusable neglect.

In support of the motion, the appellant files the following affidavits:

James C. Denny, on his oath, says that he is one of the attorneys in the above entitled cause, that at the time the clerk of the superior court was preparing the transcript in this case, he was informed that the demurrer to the complaint which was filed therein, and the exhibits referred to in the complaint, were off the files, and could not be found.

He then had said papers supplied and then directed the clerk to complete the transcript.

A few days thereafter he learned that the record was complete, and, as he now remembers he informed Judge Claypool of the fact.

After he learned that the record was completed he procured from the clerk of the superior court, the original papers in said cause, he then found the complaint, the exhibits, the demurrer to the complaint and the abstract and assignment of errors endorsed thereon, and supposed the same had been copied into the record, which was filed in this court.

He now makes a copy of said abstract and assignment of errors a part of this affidavit marked Exhibit A.

He further says that he was informed by Judge Claypool, who filed the records in this court, that he had filed a written re-
2305 quest that the cause be argued orally; that for this reason he did not examine a copy of the record on file in this court; he knew that the abstract and the assignment of errors were with the papers a few days after the clerk had completed the transcript of the record, and therefore, supposed that it was on file and with the papers at the time the record was made for this court.

He says that he did not examine the record on file in this court, because he supposed and believed that the magnitude of the cause would induce the court to grant an oral argument of the same and that a time would be fixed for such argument and that sufficient time would be allowed to examine the record and prepare for the argument, and for this reason he did not examine the record on file in this case.

He further says that at the time the clerk called his attention to

the fact that the demurrer to the complaint and the exhibits were lost he said nothing to him about the abstract and assignment of errors being off the files.

J. C. DENNY.

Solomon Claypool, being duly sworn, on his oath says, that he is one of the attorneys for the appellant in this case, and he believes there is merit in the appeal.

He further says that before the transcript was made out for the supreme court, his attention was called to the fact that the demurrer to the complaint and all exhibits to the complaint were missing from the files, and that he, the affiant, assisted in supplying
2306 said missing papers, and supposed that the record was complete.

When the record came into his hands, knowing that there was but one error that could be decided, he assigned of that error, believing the record to be complete.

The fact that the affiant's attention had been called to the two missing papers, was calculated to, and the affiant supposed it did create an impression that the transcript was correct after said papers were supplied.

The affiant cannot now state whether he did or did not look through the whole record before assigning or directing the errors to be assigned.

But the affiant believes that he did examine the certificate of the clerk, but of this the affiant cannot speak with certainty.

Affiant further says, that in the brief filed by the appellant, he prayed the court for an oral argument of this case, and a copy of said brief and petition is herewith filed as a part hereof.

S. CLAYPOOL.

The transcript in this case was filed in this court and the cause submitted by agreement on the 17th day of November, 1876.

The briefs, which were those used at the hearing of the case in the general term below, were filed in this court on the 29th day of Jan. 1877, since which date to the 25th day of Nov. 1878
2307 the day upon which the case was decided by this court, it does not appear that the counsel for the appellant had taken any action in the case.

Then it appears that two years elapsed from the time the appeal was taken to this court before the final decision of the case.

How the fact that the exhibits and demurrer to the complaint were missing before the transcript was made, and that the clerk did not inform them of any other defect, was calculated to create, or did create an impression in the minds of the counsel that the transcript was correct after the missing papers were supplied is not apparent to us.

It would rather seem that it ought to have awakened their attention to the fact that the transcript might be imperfect in some other respect.

Nor can we see why their petition for an oral argument can be made an excuse for relaxing their diligence in seeing that the case was properly prepared for the argument to be heard.

And surely the magnitude of the case is no excuse for being less diligent in pursuing their rights than they otherwise would have been if it had been of less importance.

Notwithstanding all that is stated in the affidavits, the fact appears plain to us that the counsel, from the time the appeal was taken until after the final decision was made, a period of two years, did not examine the transcript to see that it was correct, indeed,
2308 it does not appear that they ever examined it at all, for if they had, the diminution being so palpable and in so material a part, they certainly would have discovered the defect.

It does not appear to us that such a state of facts could fairly be called within the range of a sound judicial discretion, a mistake, inadvertance, surprise or excusable neglect; indeed we very much fear, that an exercise of our discretion, holding such state of facts sufficient, would amount to abuse.

Sheffermeyer *vs.* The Columbia City German Building, Loan and Savings Association, 58 Ind. 191.

The appellant also claims that if no other relief can be granted and should grant their petition for a rehearing that the court the transcript being defective—had no jurisdiction to finally decide the case by affirming the judgment but that the appeal for the reason of the defect in the transcript ought to have been dismissed, and in support of this view the counsel cite section 581 of the code which enacts that no appeal shall be dismissed for any informality or defect in the transcript or appeal bond if the appellant shall correct the informality or defect within a reasonable time.

2, R. S. 1876, 247.

We think that two years was a reasonable time to correct the informality in their transcript.

Besides we cannot see how that section can require us to
2309 dismiss this appeal, when it forbids the dismissal of an appeal for the causes alleged against this transcript.

The appeal was properly taken, the proper assignment of error was made in this court, the cause was submitted for our decision we could not therefore, afterwards, *ex officio*, dismiss the appeal.

We could not dismiss it on motion of the appellee, no one but the appellant could dismiss the appeal, and unless the appellant did dismiss it, the appellee was entitled to the judgment of the court.

For these reasons we were required to decide the case and not dismiss the appeal—and no one claims that it could have decided any other way in the condition of the transcript, than to affirm the judgment.

The authorities concur with our reasoning on this point: Wilson *vs.* Harrison 44 Ind. 468; Bush *vs.* The Grover and Baker Sewing Machine Company 48, Ind. 258, Russel *vs.* Harrison 49 Ind. 97,

Huffman *vs.* The Indiana National Bank of Indianapolis 51 Ind. 394, Stowe *vs.* Rankin 61, Ind. —. And the practice is settled that we cannot grant a rehearing for the purpose of amending the transcript: Warren *vs.* Campbell 39 Ind. 409, Cole *vs.* Allen 51 Ind. 122.

The great magnitude of the case—the amount claimed being one hundred thousand dollars—the fact that the State is the appellant and that the cause of action being for the benefit of the
2310 school fund, is one of great public importance, were all forcibly urged upon us by the counsel for appellant in oral argument on the petition for a rehearing, but we do not perceive the force of this reasoning.

The law takes no greater care of large amounts than it does of small ones, unless the latter are so infinitessimal as to fall within the maxim, *de minimus non curat lex* nor has the interest of the State any higher claims to justice than those of the appellee or any private person, and we know of nothing of greater public importance than that the courts should decide every cause before them according to law and the facts.

Both the motion and petition must be denied.

On the same day December 16, 1878, a second petition for rehearing was filed, and on the 15th day of April 1879, the same was overruled.

It is therefore considered by the court that the judgment of the court below, in the above entitled cause, be in all things affirmed at the cost of the appellant, all of which is ordered to be certified to said court.

And it is further considered by the court that the appellee recover of the appellant the sum of — dollars and — cents for its costs and charges in this behalf expended.

2311 STATE OF INDIANA:

Supreme Court.

I, Gabriel Schmuck, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said court in the above entitled cause.

In witness whereof, I hereunto set my hand and affix the seal of said court at the city of Indianapolis, this 17th day of May, 1879.

[SEAL.] GABRIEL SCHMUCK, *C. S. C.*

Filed May 19th, 1879.
D. M. RANSDELL, *Clerk.*

2312 STATE OF INDIANA, }
County of Marion. }

I, George B. Elliott, clerk of the superior court within and for the county aforesaid do hereby certify that the foregoing transcript contains full true and complete copies of all the entries of proceedings had, and of all the papers filed in said superior court, belonging to cause numbered 10290, as appear from the records and files thereof, now in my custody and keeping.

In testimony whereof, I herewith subscribe my hand and affix the seal of said superior court the 27th day of December, 1899.

[SEAL.] GEORGE B. ELLIOTT, *Clerk.*

2313 Mr. WILLIAMS: Now we offer in evidence the opinion of the surperior court of Marion county, Indiana, delivered in cause number 10290 in sustaining the demurrer to complaint.

Mr. KETCHAM: To that may the court please, we desire to object.

The MASTER: Well the objection is sustained.

Mr. WILLIAMS: Now to make my offer good I introduce this opinion and ask that it be reported with the evidence in the cause.

The MASTER: The same entry will be made as was made with reference to the other matter that was excluded.

To which ruling of the master in excluding the said opinion of the court the defendant by its counsel then and there accepted.

Which said opinion of the court so excluded by the master, is in the words and figures following, to-wit:

2314 THE STATE OF INDIANA *ex Rel.* ATTORNEY-GENERAL }
vs. }
TERRE HAUTE & INDIANAPOLIS R. R. }

BLAIR, *J.*:

The defendant was incorporated by an act of the legislature, approved Jan. 26th, 1847 entitled "An act to incorporate the Terre Haute and Richmond Railroad Company.

The complaint alleges an acceptance of the franchises by the persons named in the act, and an organization thereunder; and that by an act of March 5th, 1865, the corporate name was changed to that of the Terre Haute and Indianapolis Railroad Company, the name now borne by the defendant.

After other formal averments it is alleged that the corporation began and constructed and put in operation by the first day of March, 1852 (within the time prescribed) a line of railroad between Terre Haute and Indianapolis.

That on March 6th, 1865 by an act of the legislature, seven years' further time was given to complete and extend the road from Terre Haute to a point on the western line of the State, which extension — paid out of the earnings of the road and by money borrowed on the bonds of the company.

That the corporation was given the right to charge and receive such tolls and freights as might be deemed for—

2315 The best interests of the company,

and to change lower or raise them at pleasure and was required to make semi-annual dividends of the net profits and earnings of the road, less only such portion as the directors might deem it necessary to retain as a contingent fund to pay subsequent expenses.

It is further alleged that by the twenty-third section of the charter, when the aggregate amount of dividends declared should amount to the full sum invested and ten per centum per annum thereon, the legislature might or should so regulate the tolls and freights that not more than fifteen per centum on the capital employed should be divided, and that the surplus profits if any after paying the expenses and reserving such proportion as might be necessary for future contingencies, should be paid over to the treasurer of State for the use of the common schools.

It is then alleged that the total cost of said company for constructing and equipping said road was the sum of one million three hundred thousand dollars, which was all the money at any time invested in said road.

That said sum was raised by stock subscriptions, by the sale of stocks of the company and by issuing and selling the bonds of the company, some of which bonds were afterwards, by the holders thereof, converted into or exchanged for stocks of the company.

2316 That the net earnings of the road since its completion, is eight million dollars, received at certain times as shown by an exhibit, one million dollars of which has been used in making permanent improvements.

Charges Against the Defendants.

The following charges are then preferred against the defendants:—

a. That in violation of section 24, the company did not make semi-annual dividends of all the profits, but unlawfully withheld large sums over and above what was reasonably necessary as a contingent fund to pay subsequent expenses.

b. That the moneys so withheld were invested in United States bonds as an investment, and in bonds and stocks of other railroads, in and out of the State, and in city bonds, and in the purchase of its own stock from individual holders, to the aggregate sum of three million dollars.

That said investments were not made for the purpose of aiding in the construction of lateral roads, but were made for the fraudulent and corrupt purpose of preventing the dividends declared from reaching the full sum invested and ten per cent. interest thereon and of preventing the time being reached when the State might

legislate to regulate the tolls, and defeat the operation of the 23rd section of the charter, and defraud the State.

c. That for the same purpose the defendant withheld the net earnings, above a reasonable contingent fund, $2,000,000 as a surplus fund.

2317 *d.* That for the purpose of preventing legislation to regulate the tolls and to cheat the State, the defendant unlawfully increased the capital stock by converting bonds of the company which had been paid off into stock, to the amount of 50,000 to represent bonds supposed to be lost, and placing said stock in the hands of Chauncy Rose, as trustee for the company, and declaring dividends thereon to the credit of the company.

f. And from time to time issued stock dividends to the stockholders to the aggregate sum of $600,000.

g. That the defendant falsely and fraudulently represented and held out, by her printed reports and otherwise, that the capital stock of the company amounted to $2,015,000, which had been invested in said road, whereas, in fact, only $1,300,000 had been invested.

All of which was done for the purpose of cheating the State, and for the purpose of making it appear that the net earnings were less than the sum invested, etc.

h. That for the same purpose the defendant charged up to the investment the whole of the construction account, when in fact more than one-half of such account was at different times made up of borrowed money obtained upon the bonds of the company, which bonds and the interest thereon, were paid out of the earnings of the company.

i. That for the same purpose, the defendant, after having

2318 purchased of its own stock, shares to the amount of $550,000, instead of retiring the same, placed it,

In the hands of Chauncey Rose, as trustee,

and continued to hold out said stock as representing part of the investment.

j. The defendant at all times falsely and fraudulently reported that the investment and ten per cent. per annum thereon was always in excess of the net earnings, when in fact more than ten years ago the net earnings were in excess and now exceed more than $1,500,000.

k. That in the years 1865, 1867 and 1869 and at other times, the legislature appointed committees to investigate the affairs of the defendant, that while such committees had this matter under examination the defendant laid out and expended large sums of money to the members of such committee- for the purpose of influencing the action of said committees, and to prevent investigation or legislation regulating such tolls.

l. That the defendant also and for the same purpose, paid large sums of money to the officers of the senate and house, and other persons, to hire them to influence members to act for and in the interest of said corporation and against the interest of the State.

2319 *m.* That in 1867, while a joint committee of the legislature had the matter in charge, defendant, for the fraudulent purpose aforesaid, paid their hotel bills, and furnished them carriages to drive in, etc., and made them drunk, and thereby prevented any report, etc., and hindered the legislative action.

That by reason of the premises the dividends declared have at no time reached a sum equal to the full sum invested and ten per cent. thereon, though the net earnings are and have for a long time been greatly in excess of that sum, and fifteen per cent. upon the capital employed by near $2,000,000.

That, by reason of the said wrongful conduct of the defendant, the time when the State might regulate the tolls and freights has never been reached, and that the defendant has not at any time paid over and accounted to the State for any portion of the net earnings, and that, on fair accounting, there is due the State the sum of

Fifteen hundred thousand dollars,

for which judgment is asked.

In the second paragraph of the complaint the same averments are made as to the organization of the company, change of name etc.

It is then alleged that defendant, in violation of the charter, for the purpose of defrauding the State, and school fund, and to
2320 prevent the declaration of dividends as provided by sections 23 and 24 of the charter, failed to use and appropriate the net profits as required, but in violation of the charter, used large sums of such net earnings as follows, to-wit:

a. In 1854 the defendant subscribed (through its board of directors) for the stock of the Evansville and Crawfordsville railroad, to the amount of	25,429.89
b. In 1860 the defendant invested in the same company	105,000.00
c. In April, 1862, defendant invested in the Cincinnati and Indianapolis railroad	50,000.00
d. In March 1861, in the bonds of the St. Louis Alton and Terre Haute railroad	85,696.00
e. During the year 1862 it advanced to the St. Louis Vandalia and Terre Haute railroad	191,258.47
f. During the same year invested in bonds of the Nashville and Henderson railroad	42,500.00
g. During 1869 in the stock of the St. Louis Vandalia and Terre Haute railroad	265,000.00
h. In 1868, 1869 and 1870 purchased the bonds of the same company to the amount of	460,400.00
2321 *i.* In the year 1870 invested in the stock of the Terre Haute and Chicago Railroad Company	50,000.00

That the defendant has invested other large sums of the said net earnings in other corporations and enterprises, the particulars of

which are unknown to the plaintiff, but the aggregate of which is $3,000,000.

j. The same averments as to $50,000 of bonds paid off, and $5,000 which were lost, and *and* for which stock was issued and given to Rose as a trustee, as in the first paragraph.

k. That in 1867 defendant purchased 5,872 shares of its own stock out of the net earnings, paying $1.81 or for the whole amount $531,416, and had the same transferred to C. Rose as trustee for said company, who has ever since held the same, that the stock has been voted at all elections, and dividends have been paid thereon.

l. That on the — day of —— 1856, a stock dividend of twenty per cent. was declared and issued, amounting in the aggregate to $211,600.

m. That in 1864 another stock dividend was declared and issued of twenty-five per cent. making, with the other stock dividends, an aggregate of $376,700, that said stock dividends were made for the purpose of,—

Increasing the basis of dividends and diminishing the rates.

2322 *n.* That the total amount of valid stock has been and is $1,344,000.

But the defendant claimed and represented in her public reports that she had paid dividends to *bona fide* stockholders on the amount of $1,988,150. of stock, when, in fact, there was only $1,344,000 of valid stock.

o. That defendant has for the last ten years retained out of the net earnings, and withheld from stockholders each year $100,000 more than was necessary for a contingent fund to meet subsequent expenses, no part of which has ever been accounted for.

p. That during the session of the General Assembly for 1869, a committee was appointed to examine into -he affairs of said company, and particularly as to the rights of the State, as affected by section 23 of the charter, that while said committee were engaged in their work, defendant corruptly and unlawfully offered and gave to each member thereof, $2,500 for the corrupt purpose of influencing their action, and of preventing a report prejudicial to the defendant, and to induce them to suppress the facts and to prevent legislation looking to the carrying out of said 23rd section.

That said corrupt means did prevent the house from taking any action in the premises.

That each of the aforesaid acts was done for the purpose of preventing the contingency arising in which the State could interfere to regulate the tolls and freights of said company, and thereby
2323 defendant did prevent the State from knowing that the profits realized exceeded the cost of the road and ten per centum per annum thereon and thereby prevented the State from obtaining the knowledge which was necessary to place her in a condition in which she could interfere to regulate said tolls, etc., and that but for said fraudulent acts the State would have regulated the tolls, etc.

A third paragraph is for the recovery of $100,000 for money illegally demanded, collected and received by said company in the transportation of troops and munitions of war for said State during the late war, to-wit: 1861, 1862, 1863, 1864, 1865, and 1866. Separate demurrers have been filed to each paragraph of the complaint.

The questions involved have been, by a full and elaborate argument, presented to the full bench for consideration.

2324 The claim of the State,

as made in the first and second paragraphs of the complaint, is based on the provisions of the 23rd section of the charter on act of incorporation. That section, together with others of the original act, to which reference will be made, reads as follows:

"SEC. 22. The corporation may charge and receive such tolls and freights for the transportation of persons commodities and carriages, on said road or any part thereof, as shall be for the interest of said company, and to change, lower or raise at pleasure. *Provided*, That the rates established from time to time be posted in some conspicuous places on said road.

"SEC. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested, and ten per cent. per annum thereon, the legislature may so regulate the tolls and the freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and reserving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of State for the use of common schools. But the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made. And it shall be the duty of the corporation to furnish the legislature if required, with a correct statement of the amount of expenditures and
2325 the amount of profits, after deducting all expenses, which statement shall be made under the oath of the officer whose duty it shall be to make the same.

"SEC. 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday of December and July annually, unless the directors fix on a different day. And pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses. And the directors may retain such proportion of the profits as contingent fund to meet subsequent expenses as they shall deem proper."

"SEC. 35. (Not copied because repealed.)

The first two paragraphs of the complaint seem to proceed upon the theory that by the terms of the charter there must have been some action taken by the legislature in reference to the tolls and freights before the State can claim to recover of the defendant moneys which should be paid over to the treasurer of State for the use of common schools, but that the fraudulent acts of the defendant, as

alleged in the complaint, are sufficient to excuse such action on the part of the legislature. But it is also claimed by the plaintiff that the "twenty-third section is, in and of itself, a limitation upon the profits of the road and an appropriation, is not contingent either on precedent legislation or on the amount of dividends declared and paid to the stockholders."

2326 This latter claim is, of course, based upon the theory that the averments by which it is sought to excuse legislative action may be regarded as surplusage, and the other allegations be taken as sufficient to authorize a recovery. We regard the complaint as susceptible of its construction, and hence it presents two questions, as follows:

First. Can the plaintiff recover without precedent legislation on the part of the State?

Second. If precedent legislation is required, are the allegations of fraudulent acts on the part of the defendant sufficient to excuse such legislation? It is not difficult to see from the terms of the charter that at the time it was passed the leading object in the mind of the legislature was to secure the construction of a railroad between the points named in the charter. The great system of railroads as they now exist, was perhaps not within the expectation of the members, and, in view of this fact, we do not regard the 23rd section as primarily intended to augment the school fund, but, on a certain contingency, to reserve the power in the legislature to deprive the defendant of all interest in accumulating profits over and above a certain amount, and thus put a check upon the power of the corporation to acquire profits by taxing the carrying trade of the country. By the 35th section of the act the legislature originally required the defendant to keep an accurate account of all expenditures and receipts, the books, by the language of the act,

2327 to be "always open for the inspection of any agents of the State, appointed for that purpose by the legislature, and upon any refusal to exhibit their books and accounts to said agent, upon request made to the president all power granted by this act shall cease."

This section of the charter was repealed on the 16th day of February, 1848, before the construction of the road. This repeal, before any rights on the part of the State had been acquired, indicates an early and doubtless unwise letting go of restraints upon the corporation on the part of the State. In considering the questions involved we must construe the 22nd, 23rd, and 24th sections together. The 22nd gives the defendant power to charge and receive such tolls and freights "as shall be for the interests of said company, and to change, lower or raise at pleasure." Self-interest on the part of the corporation is the only regulation prescribed in this section by the legislature. The company is given the power to tax the carrying trade without limit, only reserving the check of self-interest to prevent the corporation from driving the people to the use of wagons and other modes of transportation in vogue before the era of railroads. The 24th section, which we think in its proper connection

(having reverence to the subsequent matter) follows next after the 22nd, requires the defendant to make semi-annual dividends of so much of the profits as the corporation may be able to acquire by the powers conferred by the 22nd section, "as the corporation may deem expedient."

2328 Having thus provided for such dividends as may be deemed expedient, the legislature seems to have thought there might be an attempt to give the stock a fictitious value by excessive dividends, and hence the power is held in check by providing in the 24th section that "no dividends shall be made to a greater amount than the net profits after deducting all expenses; and that the treasury might not be

Depleted by dividends

and the company suffer want in a possible time of scarcity, the directors were given the power to retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper. In connection with the foregoing rather extraordinary powers, we have the provisions of the 23rd section which, in our judgment, may be analyzed as follows:

1. It gives the legislature the power to "so regulate the tolls and freights that no more than 15 per centum per annum shall be divided on the capital employed."

2. It defines the time when such legislative action may be taken not by fixing a certain day or year in the calendar, but it is to be "when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon."

3. The legislative power is checked so that the corporation shall not be compelled by law to reduce their tolls and profits so
2329 that a dividend of 15 per centum per annum cannot be made."

4. Conceiving that it might be impossible to make a tariff of tolls and freights that would yield a profit of fifteen per centum per annum, "neither more nor less," we have the provision that "the surplus profits, if any, after paying the expenses and reserving such proportion as may be necessary for future contingency, shall be paid over to the treasurer for use of common schools."

It will be seen from the above that at no time can the legislature so fix tolls and freights as to reduce the dividends below fifteen per centum per annum, and out of any profits above that,

The company has the right

to reserve "such proportion as may be necessary for future contingencies." As before stated, the claim of the plaintiff, as far as a recovery is sought without reference to precedent legislation, is based upon the proposition that "the 23rd section is in and of itself a limitation upon the profits of the road, and an appropriation of the surplus earnings of the road over the amount of that limitation to

the school fund, and the right of the State to the benefit of that appropriation is not contingent either on precedent legislation or on the amount of dividends declared and paid to stockholders." We cannot regard this as a correct view. The other sections confer an almost unlimited power as to freights and tolls, and it is only after the stockholders have been reimbursed the
2330 full amount invested and ten per cent. per annum thereon that there can be any limitation upon the profits of the road or the amount of semi-annual dividends except as provided in section 24 "It is not the corporation that is required to so regulate the tolls and freights that no more than fifteen per centum per annum shall be divided on the capital employed," but the power to regulate it is simply reserved in the legislature. After the legislature exercises the power reserved by the 23rd section, then the dividends to the stockholders are or may be limited to fifteen per centum per annum, and then, and only then, in our opinion, does the corporation become a debtor to the State for the surplus. This conclusion we believe to be strengthened by a comparison of the 23rd section with the provisions of the 35th section, which, as before stated, was repealed in 1848, but the language of which we may look to in determining the legislative intent.

The 35th section gave the State the right to purchase the stock of the company "at any time after twenty-five years, by paying to said corporation a sum of money, which, together with the tolls received, shall equal the costs and expenses of said railroad as aforesaid, with an interest of ten per centum thereon."

This provision was without any reference to dividends that may have been made previous to the time fixed when the State
2331 might become a purchaser; and the terms of purchase are claimed and unequivocal. We see no reason why terms equally as explicit should not have been used if it was intended by the 23rd section that after the corporation had received of the earnings of the road the full sum invested and ten per centum per annum thereon, all surplus over and above fifteen per centum per annum of profits should go to the school fund without any further legislation. We have seen that by the first clause of the 35th section the legislature required the books of the company to "always be open for the inspection of any agent of the State appointed for that purpose by the legislature," and for a refusal of such inspection all corporate powers were to cease. The repeal of this only left it in the power of the legislature to require a correct statement under oath "of the amount of expenditures and the amount of profits after deducting all expenses," as stated in the last clause section 23. This is evidently intended to enable the legislature to act intelligently in regulating the tolls and freights by making it the duty of a corporation to furnish the sworn statement" if required. The State has no interest in reducing the tolls and freights to a point where the profits shall be as near the fifteen per centum as possible, except it would be for the purpose of preventing an unjust tax upon the carrying trade, if the dividends are already by the provisions of the charter limited

to fifteen per centum per annum, and the profits above that sum appropriated to the school fund.

2332 If the primary object of the legislature had been to increase the school fund by the surplus over and above fifteen per centum no accurate statement need be required, and the propriety of legislation would only depend upon the interest of commerce and trade in the use of the defendant's road as a common carrier of goods and passengers. But if we take the other, and in our opinion, more correct view of the case, that the primary object of section 23 is to reserve a power in the legislature by which the rate of tolls and freight may be reduced to reasonable limits, first by a positive act of legislation, and secondly, when that is done, the terms of the section itself limiting the amount of dividends to fifteen per centum we see at once the necessity and propriety of the legislature having the intimation which she may require the defendant to give. In view therefore of the construction placed upon the different sections, we conclude that the State cannot call upon the defendant to pay surplus earnings over — the State as a part of the school funds without having previously legislated by regulating the amounts of tolls and freights. We next inquire whether the facts alleged in the complaint excuse such legislative action. It is shown by the complaint that dividends have never been declared aggregating the amount invested and ten per centum per annum thereon.

2333 The company is charged

with doing various things for the purpose of preventing dividends from being made, such as investing large sums in projects *ultra vires*, and with acts of fraud to prevent legislation on the subject of freights. We do not deem it necessary to examine these matters in detail. If we are correct in the position before assumed that the excess of profits, over and above fifteen per centum per annum on the amount of capital invested, and such sums as may be proper to reserve as a contingent fund by the act of incorporation, is not appropriation to the State without further legislative action, and that, until such action is taken, there is no limitation upon the amount of profits that may be realized and the amount of dividends made, then the State cannot recover on the ground that earnings of the road may have been used in purchasing bonds of other companies, and various other investments made. If the surplus earnings in such case are not given out as dividends, there can be no objection on the part of the State to the investment in stocks, bonds, etc., for the corporation may acquire and hold property by acts *ultra vires*. Conceding that the State might as a party interested in the surplus earnings after dividends to a certain amount have been made to the stockholders by proper proceedings, compel the company to make dividends improperly, corruptly and willfully withheld, if the right to a surplus depends, as we have held, upon precedent legislation

2334 regulating tolls and freights, the State, by such proceedings, would have no interest in the earnings already made, but if

divided they would go to the stockholders, and if they were thereby fully reimbursed as provided in the 23rd section, the State might then regulate the tolls and thereby acquire an interest in all future earnings over and above the limits of dividends thereafter allowed. This must be a correct view of the question, for the terms of the 23rd section do not limit the amount of dividends that may be made under the extremely liberal provisions of the twenty-second and twenty-fourth sections, until such time that the legislature may regulate the tolls and freights, and the regulation of the tolls and freights by the legislature operates to limit the amount of earnings to be thereafter divided. The stockholders are not, without further legislation, prohibited from receiving any amount of dividends, either annually or in the aggregate amount, nor the company prohibited from regulating the tolls and freights so that they may be able to make large dividends. It follows from this that the stockholders have a vested right in the earnings and accumulations already made, by reason of the State having failed to act under the power reserved by the terms of the charter. In addition to the foregoing it must be conceded that there is much force in the suggestion that under the original charter and the amendments thereto, particularly the third section of the act of March 12th, 1851, the

State can not recover any surplus profits until the corpora-
2335 tion has accomplished all the objects and carried out all the powers given by the charter. But as the complaint shows that the defendant has now accepted the provisions of the general railroad law, the questions argued, as far as they relate to unaccomplished objects, have become unimportant, and we do not decide anything upon this point. Again, the defendant is charged with corrupting committees of the legislature, sent out to acquire information for the purpose of enabling the General Assembly of the State to act intelligently in making the necessary legislation to place the State in a position to recover of the defendant. Conceding that a corporation might be held to have lost certain rights, or to be liable on account of its officers, or other persons, having corrupted and debauched members of the legislature, it certainly is not good morals for a State to claim that she had acquired a civil right of action against such corporation by reason of any of her officers having been debauched and bribed. The right to inflict the severest penalties for the crime should be all that she should ask, and should see that the guilty should not go unpunished.

The legislature did not proceed

in the manner prescribed by the 23rd section—that is, by first calling for a sworn statement of the amount of profits and expenditures and expenses, and she cannot excuse herself from acting
2336 in the mode prescribed by the charter by showing that she pursued other and different means that prove ineffectual.

We are, therefore, of opinion that no valid excuse is given in either paragraph of the complaint for a failure on the part of the

legislature to act as required, in order for the State to have the remedy sought by the first two paragraphs of this complaint. The third paragraph of the complaint is based on the 30th section of the act of incorporation, which reads as follows:

"The State, in time of war, shall have the right to transport troops, munitions of war and provisions free of toll, on said road."

The language of this section might probably be construed to mean that the State, in times of war, might have the privilege of transporting her troops, munitions of war and provisions over the defendant's road, in her own trains and cars, free of charge. The use of the words "tolls," instead of freights or charges, would sustain such construction, but we do not put our decision on this ground. For aught that is alleged, the payment was a voluntary one, made after the troops were transported to their destinations and munitions and provisions delivered to the consignee. In this case there can be no recovery, and the paragraph is, therefore, bad.

The demurrer will, therefore, be sustained to each paragraph of the complaint.

Mr. WILLIAMS: Did you compare those copies?

Mr. HAWKINS: Yes I compared them; they are all right.

2237 Mr. WILLIAMS: The defendant introduces in evidence——

Mr. KETCHAM: Wait a moment; offers in evidence

Mr. WILLIAMS: I did offer it yesterday. In order that I may be entirely right I offer it now. My recollection is I did offer it yesterday. The defendant offers in evidence the extracts from the report of the attorney general of the State of Indiana, made to the governor as they appear in part one Documentary Journal for 1874; and also offers from the same journal that portion of the message of the governor of the State to the legislature, showing the transmission of this report to the legislature.

Mr. KETCHAM: We object.

The MASTER: For what purpose is that offered, Mr. Williams? I don't know anything about the character of it. I suppose that will appear though from Mr. Ketcham's objection.

Mr. KETCHAM: We object to it for the reason that it is incompetent, irrelevant and immaterial; that what the attorney general may have reported to the governor, or what the governor may have reported to the General Assembly with respect to the proceedings in the Owen circuit court do not tend to throw any light upon the question here, do not show that there was such proceedings had in the Owen circuit court as are referred to, and that if they did they would not be competent evidence as tending to support the

2238 plea of former adjudication, and that the records of that case are the best evidence, and it has already been held that the records of that case are not admissible in evidence; and that so far as it professes to show that a copy of the agreement to submit it in evidence was sent to Martinsville for the approval of Messrs. Claypool and Harrison, it is mere heresay, and does not tend to show that it had been approved by them, and that if it had been it does

not tend to sustain the plea of former adjudication; nor does it tend to show that the defendant was not indebted to the State and it is therefore not germain to or relevant to any issue that is referred to this master.

Mr. WILLIAMS: The report is mentioned in our third paragraph of the answer, both reports which I propose to introduce, and it deals with this case in the superior court of Marion county; it reports the bringing of that case under this agreement.

Mr. KETCHAM: And we object for the further reason than in as much as it is not proposed to be followed up by proof of any action of the General Assembly taken upon it, that it is not binding upon the State.

2339 Mr. WILLIAMS: This one report, this one that I did offer, closes with showing the execution of the agreement which I offered in evidence yesterday.

Mr. HAWKINS: The report in short states what took place, as the attorney general says, with reference to the execution of this agreement which was offered in evidence yesterday, giving what steps he took with reference to the associate counsel Judge Claypool and Mr. Harrison and then sets out *in hæc verba*, the agreement that Mr. Williams introduced yesterday.

The MASTER: The objection is sustained for the reasons that I have already indicated.

To which ruling of the master the defendant by its counsel at the time excepted.

Which extract from the report of the attorney general excluded by the master is in the words and figures following, to-wit:

Copy from report of att'y gen'l and gov. for period ending Nov. 6, 1874—Documentary Journal part 1 1874–6 at page 17—such report having been submitted by the gov. to the leg. with his message to 49th reg. session. Begun Jan. 7th, 1875.

"Terre Haute and Indianapolis railroad.

2340 THE STATE OF INDIANA on the Relation of John C. Robinson, Prosecuting Attorney, *vs.* THE TERRE HAUTE AND INDIANAPOLIS RAILROAD Company. } *Quo Warranto.*

This action was pending in the Owen circuit court and is still. The venue was changed from one judge to another until finally Judge Hester was called to preside in the case. The cause was put at issue and submitted to a jury. After hearing the evidence the jury failed to agree and were discharged.

Prior to the next term of the Owen circuit court an agreement was entered into between the company and the State by which it was agreed that a suit should be brought against the company in the superior court of Marion county. Before the execution of said

agreement by Your Excellency and the lieutenant governor I called at the office of Judge Claypool in this city for the purpose of submitting the same to him for his approval where I was informed that he was at Martinsville attending court. A copy of the agreement was then prepared and sent to Martinsville for the approval of said Claypool and Hon. W. R. Harrison each of whom have been engaged in said cause from its inception. The copy thus sent was returned with the approval of said Harrison entered thereon: Court met in Owen county the next week. The agreement was signed by Your Excellency and myself. Governor Sexton returned to the city again. I then notified Judge Claypool when the matter would be finally acted upon.

He replied that he did not think he could be present.

2341 Governor Sexton remained until 4 o'clock and then signed the agreement. The agreement above referred to is in these words:

In the Owen Circuit Court, October Term, 1874.

THE STATE OF INDIANA *ex Rel.* JOHN C. ROBINSON, Prosecuting Attorney, etc.,
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

The parties to the above cause make the following agreement: The defendant agree- by her attorneys and officers to at any time enter the appearance of the defendant to an action to be instituted by the plaintiff (The State of Indiana) in the superior court of Marion county for the recovery of any money which may be due or claimed to be due the State or the school fund of the State of Indiana under and by virtue of said company's charter of January 26th 1847, and the amendments thereto. In consideration of which said agreement the plaintiff by her attorneys and proper officers agrees to suspend further prosecution of said action now pending in the Owen circuit court until the final determination of such action so as aforesaid to be instituted for the recovery of money; and if in said last named action the defendant shall prevail then the said plaintiff agrees to dismiss said suit in the said Owen circuit court and if the said plaintiff in the said action to be instituted for money shall prevail the said action in the Owen circuit court shall be dismissed only when the defendant shall have satisfied the judgment so obtained in the latter actions for money; but

2342 nothing herein shall be construed (as) to compel the dismissal of said suit in the Owen circuit court until said action so to be instituted shall have been finally tried upon the issues joined between the parties or it shall be found in framing the issues and determining by the court that no right of action exists in favor of the State or the school fund. And it is further agreed that the agreed statement which was prepared to be and which was in part used in the trial of said cause in the Owen circuit court may be

used as evidence without objection so far as the same may be competent in the suit to be brought by the State against said company. It is further agreed that either party may withdraw the depositions on file in the Owen circuit court in said cause and may read the same so far as the same in their subject matter may be found competent. And that this may be done notwithstanding any order of the Owen circuit court suppressing the same; provided the party so using any such depositions shall cause the same to be filed in the court where the cause may be pending twenty days before the day for which said trial is set for trial; but this agreement shall not be construed to prevent either party from taking additional depositions of the same or other witnesses. And it is agreed that if in making up the issues and on the trial of said cause it can be shown under the law and the evidence that is adduced that any money is due to the State or school fund of the State from said old company
or companies, (by whatsoever name or names) under or by
2343 virtue of (or) said charter and amendments thereto and the law and facts as applied thereto; that then and in that case the company as now organized shall pay such amount and judgment shall be rendered in said action for money for the sum that may be found due. Nothing herein contained shall be construed to prevent the defendant from setting up any defence which existed in behalf of said old company prior to the surrender of the said old charter.

Indianapolis, October 5th, 1874.

J. C. DENNY, *Attorney General, Indiana.*
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY,
By W. R. McKEEN, *President.*
R. W. THOMPSON,
C. F. McNUTT, AND
THOMAS R. COBB,
Attorneys for T. H. & I. R. R. Co.

This agreement made by attorney general (with the concurrence of his associate counsel as we understand) we approve,
October 5, 1874.

THOMAS A. HENDRICKS, *Governor.*
LEONIDAS SEXTON,
Lieutenant-Governor.

2344 Mr. WILLIAMS: The defendant offers in evidence extract from the report of the attorney general of the State of Indiana appearing in part one of the Documentary Journal for 1876 and extract from the message of the governor to the legislature in the same volume showing the transmission of the attorney general's report to the legislature.

Mr. KETCHAM: We object to that if the court please. It is not competent to show by the opinion or by the report of the attorney general to the governor transmitted to the General Assembly what

was in fact decided in a record or what in his opinion was the effec of a record; as it is not proposed to be followed up by any evidenc of any action taken by the General Assembly.

Mr. HAWKINS: The record already shows what was done in th case.

Mr. KETCHAM: Yes and the record already shows what was don in the case; therefore this evidence is not competent as tending t show the contents of the record and is irrelevant and immaterial t any issue joined here, for the reason that it does not show or tend t show that the matters were adjudicated nor does it show or tend t show that there was no liability by the defendant to the State

2345 Mr. WILLIAMS: I presume it comes within your honor' former ruling.

Mr. MAXWELL: Doesn't that tend to show the authority of th attorney general to maintain his suit?

Mr. WILLIAMS: Not his report; I don't think it does.

Mr. MAXWELL: The fact that he did make his report to the gov ernor and the fact that the governor did transmit that report to th General Assembly, isn't that evidence tending to show a recognitio of this suit on behalf of the officers of this State? One of the objec tions urged on the argument was that the officers of the State did not have authority.

The MASTER: Yes but the court over-ruled the objection.

Mr. MAXWELL: As the master has over-ruled that objection and the court has over-ruled it, isn't it competent for us to fortify th record itself with this evidence of concurrent action on behalf of th executive of the State?

Mr. KETCHAM: We insist that the executive had no more au thority than the attorney general had; and the executiv

2346 could not confer any authority upon the atiorney general b his silence or his nonaction, or the legislature by non-actio made in recognition of it.

Mr. HAWKINS: This is a report as to what had already taken place.

The MASTER: The court as I remember its decision had sustained the right and authority of the attorney general to institute this suit and the only purpose that I can see for which this item of evidenc is now offered is in support of the plea of former adjudication, and in that view of it the objection will have to be sustained.

Mr. WILLIAMS: To this ruling of the court the defendant ex cepts.

The said extract from the report of the attorney general so ex cluded, is in the words and figures following, to-wit:

In part one of Documentary Journal 1876 is found report to gov ernor of attorney general in which on page 11 appears the fol lowing:

"The Terre Haute and Indianapolis Railroad Company.

My immediate predecessor in office, Hon. J. C. Denny in his report of November 6th, 1874, gives the history of this case to that date. Since then a civil action was brought on behalf of the
2347 State on relation of the attorney general against the company in the superior court of Marion county, demanding judgment in round numbers for a million and a half dollars. After full argument before the full bench of three judges of said court and presentation of printed briefs the court decided against the State, mainly upon the ground that under the provisions of the special charter to the company legislation regulating the tolls and freights of the company was a pre-requisite to any recovery for the State. No such legislation has ever been had and an appeal was taken to the supreme court where it is now pending."

CLARENCE A. BUSKIRK.

Dated November 7, 1876.

Mr. WILLIAMS: The defendant offers in evidence joint resolution number 16, adopted by the General Assembly of the State of Indiana, entitled "A joint resolution in regard to railroad companies and corporations, and defining the duties and giving directions to the attorney general as to suits and proceedings now pending and which may hereafter be brought," approved March 10, 1873.

Mr. KETCHAM: To that may the court please we object. I supposed that the master would take judicial notice, courts would take judicial notice of the joint resolutions of the General Assembly but if they do not and it is a proper matter of proof we object to this for the reason that the joint resolution is not within the meaning
2348 of the constitution of Indiana, a law, it can not constitute a law, nor can it be used to amend existing laws; that by the statute in force at that time and ever since and until 1899 the conduct of proceedings in *quo warranto* were exclusively — the prosecuting attorneys of the State as constitutional officers and that over them the attorney general, the statutary officer, had no control, and with them he had no concern; and that it was not competent by a joint resolution to take from the prosecuting attorney the authority and power that was vested in him by law and divide it or confer it, in whole or in part, upon the attorney general; therefore we object to the evidence as incompetent and that as showing or tending the plea of former adjudication, it is both incompetent, and irrelevant and immaterial.

Mr. WILLIAMS: If it is a matter that has to be proved—I am not clear about it in my own mind—why I want to prove it; I want to prove as a fact that this joint resolution was enacted by the General Assembly. I am not clear about it; I haven't looked it up, whether the court take judicial knowledge of joint resolutions or not. I am inclined to think they do, but I am not clear about it in my own mind.

The MASTER: I think that may go in subject to the objection and ruling already made.

2349 Mr. KETCHAM: My own opinion is that the court will take judicial notice of it; but the effect of it is another thing. We will reserve an exception.

The joint resolution so offered is in the words and figures following, to-wit:

"*Joint Resolution No.* 16."

A joint resolution in relation to railroad companies and corporations, and defining the duties and giving directions to the attorney general as to suits and proceedings now pending and which may hereafter be brought.

(Approved March 10, 1873.)

Be it resolved by the General Assembly of the State of Indiana, That the attorney general be, and he is hereby authorized, directed and required to take charge of, conduct, manage, prosecute, discontinue or dismiss, and have the control of any and all suits and proceedings now pending or which may hereafter be instituted in the name of the State of Indiana, on the relation of the State of Indiana, by any prosecuting attorney, against any and all railroad companies or corporations in the name of a *quo warranto*, or otherwise, and to adjust, settle or compromise any and all claims the State may have against such company or corporation, in such manner and on

2350 such terms as he may think proper, and receive payment of such claim in money, bonds, stocks, or mortgages, which money, bonds, stocks or mortgages, shall, by such company or corporation be paid over to the treasurer of State under the direction of the attorney general.

Provided, that any suit or suits now pending or which may hereafter be brought, shall be dismissed, adjusted, settled or compromised, whenever the same shall be directed in writing by the governor, and lieutenant-governor and upon such terms and conditions as they shall direct.

Mr. WILLIAMS: Now we are of the impression that we are about at the end of our case, but we would like to have a conference before we positively close and I can let you know at noon whether we do want to offer any more evidence or not.

Mr. KETCHAM: Do you mean at two or twelve? You will let us know if we are to come here by twelve o'clock and if we do not hear from you we will assume that the defendant has rested.

And the hearing is now adjourned to a time to be fixed by the master hereafter.

2351 THURSDAY, *December 28th*, 1899—11 o'clock a. m.

The court met pursuant to notice.

Present: The master, William A. Ketcham and Roscoe Hawkins, of counsel for plaintiff, and John G. Williams and Samuel O. Pickend, of counsel for defendant.

The MASTER: I do not know as it has been formally entered in the record that the defendant has rested.

Mr. WILLIAMS: It is substantially. We stated that if we did not notify the master before a certain time that we had something further to present it might be taken that the defendant rested. It may be entered now that the defense rests.

WILLIAM S. HARRISON, a witness for the plaintiff, called in rebuttal, being first duly sworn by the master, testified as follows:

Examination in chief.

Questions by WILLIAM A. KETCHAM, Esq.:

Q. Will you tell the master your name?
A. William R. Harrison.
Q. Where do you reside?
A. Martinsville, Indiana.
Q. Your profession?
A. Lawyer.

2352 Q. Were you engaged in the practise of that profession in the years 1869 to 1874?

A. Yes sir, been practicing there ever since 1850.

Q. I will ask you if you were associated with Judge Claypool in connection with the prosecuting attorney for your circuit down in Owen county in the *quo warranto* proceedings by the State on the relation of Robinson, the prosecuting attorney, against the Terre Haute and Indianapolis road?

A. Yes sir.

Q. Now, I will call your attention to an agreement alleged to have been made on or about the 5th of October, 1874 between the attorney general, Mr. Denny, and the Terre Haute and Indianapolis road, said to have been approved by Governor Hendricks and Lieutenant-Governor Sexton, the agreement being with reference to the prosecution of the suit against the Terre Haute and Indianapolis road by the State, and with respect to *quo warranto* proceedings; and I will ask you if at any time prior or subsequent to the execution of that instrument you had given your approval or concurrence to the agreement?

A. No sir.

Q. Judge Claypool is now dead, I believe?

A. Yes sir.

Q. If to your knowledge Judge Claypool at or about that time had given any concurrence to any such agreement as that you may state.

A. Never to my knowledge. On the contrary he was very bitterly opposed to it and denounced it.

2353 Q. Now, who besides yourself and Judge Claypool were associated as counsel for the State in the information proceedings when they were pending in Owen circuit court?

A. The prosecuting attorney at the time the proceedings were begun, I think, was John C. Robinson; and I think before the time of its dismissal there was somebody else besides Mr. Robinson; I do not remember as to that.

Q. There was some other prosecuting attorney?

A. Yes sir.

Q. And what other counsel besides yourself and Judge Claypool were associated with the prosecuting attorney in the prosecution of that information, if any?

A. None that took any active part so far as I know, unless it would be probably a consulting lawyer in Spencer as to the selection of a jury. At one time we had a jury trial, and we may have had some attorney there.

Q. Somebody down there to assist in selecting a jury, and notify you as to the time when the case should be called up?

A. Yes sir, that was all.

Mr. KETCHAM: You may cross examine the witness.

Mr. WILLIAMS: We do not care to ask him anything.

Witness excused.

2354 Mr. KETCHAM: Now may the master please, we desire to move to withdraw from the evidence, or to strike out from the evidence, the alleged agreement of the fifth of October, 1874, in regard to the compromise and adjustment that has already been offered in evidence in that connection. It is proper to suggest that it seems to us that the rule announced by the master on the admissibility of the proceedings had in the Owen circuit court would apply to this, and it was perhaps intended to apply; but as the record now stands, as I am informed by the reporter, the agreement itself is in evidence. We think it ought not to be a part of the evidence but it ought to stand in connection with the evidence. So far as the proceedings of the Owen circuit court are concerned, as a matter of course, if that goes out necessarily the testimony of Mr. Harrison, which is applicable to that, would be in the same boat; but we wanted to put in the evidence so that if the agreement is considered as a part of the evidence the testimony should also go in.

Mr. WILLIAMS: We do not care to say anything more than what we have said, may it please your honor. If your honor strikes it out we will reserve an exception.

The MASTER: I suppose under the ruling that was indicated the other day, if that testimony is in evidence, it as well as the testimony of Mr. Harrison, should be stricken out.

2355 Mr. WILLIAMS: To this ruling of the master the defendant objects and excepts.

Mr. HAWKINS: Of course the reporter understands that it all goes up with the record.

Mr. KETCHAM: Of course, if the contract goes out as evidence, it goes as the other does with the evidence but as excluded evidence; and the testimony of Mr. Harrison goes up in the same way; so that if the court should be of the opinion the other was proper to be considered as evidence it may have, at the same time, the evidence of Mr. Harrison.

Now, I desire to recall Mr. Duy.

2356 GEORGE C. DUY, a witness for the plaintiff, recalled in rebuttal, testified as follows:

Examination in chief.

Questions by WILLIAM A. KETCHAM, Esq.:

Q. Now, Mr. Duy, I wish you would take the Exhibits Nos. 58, 59, 60, and 61 offered by the defendant, being statements 1, 2, 3, and 4, and I will ask you — have compared those statements, or tables, with the evidence that you have heretofore given and the tables that you have heretofore prepared, to ascertain what if any differences there are in those tables and the tables that you have prepared, and whether you have prepared an explanation showing in what the difference consists and why? I will call your attention first to statement No. 1, Exhibit 58.

Mr. WILLIAMS: If the master please, we object to the evidence as incompetent and irrelevant for the reason that the comparison of those statements is not a matter for expert testimony of any kind. The master can compare them just as well as anybody else, and ascertain the difference.

Mr. KETCHAM: As an abstract proposition that is true, may it please your honor, but we want as far as we can to get it down, so that the master will not have to dig it out. Mr. Williams' remark would be just as applicable to the tables that the defendant put in evidence the other day.

2357 The MASTER: It may go in subject to the objection.

Mr. WILLIAMS: The tables that the defendant put in evidence were computations which did not appear in the record at all.

A. Statement No. 1, Exhibit 58, purports to be made on the basis of the books as they stand, showing the sum expended in construction and equipment each year with the interest thereon at the close of each year, and also the total of principal and interest at the close of each year. That gives the construction account by years, and up to 1856 it corresponds with the plaintiff's statement. After that the plaintiff has no construction of 1864, $376,700 in his statements, and no construction in the years 1869, 1870, 1871 and 1872 as such. I have examined the work and computation on table No. 1, statement No. 1, and it is correct except in the aggregate of expenditure

and interest at the close of 1854, and there is a difference there of a few cents, which is however corrected in the next year and is immaterial. The aggregate reached at the end of 1856, when the construction account stood on the book $1,611,450. is the same as the plaintiff's calculation exactly. Further than that there is no comparison because the plaintiff has not made any such statement.

Q. Now go to statement No. 2.

A. Statement No. 2, Exhibit 59, purports to show the dividend and the net revenue for each year. I have compared the
2358 dividend column with the exhibit made by the plaintiff and I find that so far as the cash and stock dividends are concerned, that is the per centages declared, they are the same in both statements, $4,341,274.98. The difference between plaintiff's statement of dividends and the defendant's statement of dividends—

Q. That is what exhibit?

A. Exhibit 44, I think it is—consists of items in various years of Government tax paid on dividends, and the gross sum is $117,137.48 the plaintiff in his evidence and on his theory charging that tax up as part of the dividend and the defendant leaving it out. If that is added to the dividend the total would be $4,438,412.46. In the column of Exhibit 59 showing the net revenue the items on this exhibit are the same as appear on Exhibit No. 60, statement No. 2 and to that I will pass. Exhibit No. 60, statement No. 3, shows a computation of annual net revenue on the basis of data furnished by the evidence and it gives the net revenue as computed by the defendant's witness by years, showing the net transportation revenue and all other revenue and deducting the dividend tax, the Government tax on dividends, which in gross will amount to the same sum that I gave a while ago. Now, there are various differences in the net revenues as shown by the defendant's computation and the plaintiff's. The first difference is in the year 1858. Down to the time they agree. The difference in 1858—however, I will say
2359 first, I prepared a statement, a table, giving the net revenue by years from 1858 to 1873 inclusive as claimed by the plaintiff, and also as claimed by the defendant in this computation, and on the same table giving the difference, one column showing the plaintiff's excess and another column showing the defendant excess, and the total difference between the two, the plaintiff's computation and the defendant's computation is $106,969.75 plaintiff computation in excess of the defendant's. In 1858 there is an excess in the defendant's figures and a difference of $2,325.81.

Q. That is, the defendant's figures show a greater net earning than the plaintiff's figures show by that amount?

A. Yes sir.

Q. Now, will you explain how that difference is arrived at?

A. The defendant credits from other earnings $2,700.70, and the plaintiff charges from profit and loss account Exhibit 48, $374.89 the difference being as stated $2,325.81 This is composed of various items appearing on the debit side of the profit and loss account heretofore testified.

Q. The debit side or credit side?

A. The credit side, as heretofore testified, see page 512 of the evidence. Upon further examination of the profit and loss account it appears that the same amount was charged back to profit and loss and credited to machine shop, and therefore that amount is omitted from the plaintiff's statement of earnings, leaving
2360 the correct amount $374.89. We are unable to follow this matter into the machine shop account but in my judgment the original credit of $2,325.81 should have been made to the machine shop originally, instead of to profit and loss account, and the subsequent charge to profit and loss account is to correct that error.

Q. Now, what was the difference in 1859, and what is the explanation of it?

A. The difference in 1859, the defendant credits earnings $821.48——

Q. Is that excess?

A. That is excess—see evidence 514. This is a legitimate credit, but on the profit and loss account Exhibit 48, there is a charge of $2,393.42 for loss on depreciated currency, and that year there is a balance of $2,098.94 charged to surplus account by which transfer the credit of $821.48 is wiped out, and I therefore omit it from this statement.

Q. From your statement heretofore made?

A. From the statement heretofore made.

Q. Now, if there was any difference in 1862 you may state what it was and the explanation of it.

A. In 1862 the plaintiff charges for other earnings $20,053.23 and the defendant credits, on Exhibit 60, $19,127.73, leaving a difference of $925.50, plaintiff's excess. This is the aggregate of two items charged to profit and loss on Exhibit 48 for loss on M. & I. bonds and stocks and which the defendant deducts from the earnings, but which plaintiff does not admit should be so deducted. And this year defendant deducts also taxes paid on dividends.
2361 Q. That is the Government tax?

A. The Government tax, $3,115.69, which added to $925.50 gives $4,041.19, excess of plaintiff.

Q. Now, if there was any difference in 1863 you may state the amount and whether the excess is by the plaintiff or the defendant in that account, and give the explanation of it.

A. In 1863 the excess is by the plaintiff $3,332.15 and that year the plaintiff charges from profit and loss account, Exhibit 48——

Q. Is that excess—is the plaintiff's amount larger or the defendant's amount larger?

A. The plaintiff's amount is larger. The plaintiff charges from profit and loss account, Exhibit 48, $1,726.50 from surplus account, Exhibit 47, $11,764. and interest on St. Louis, Alton and Terre Haute bonds from Exhibit 17, $2,204.68, making $15,695.18. The defendant credits $11,764 from surplus account and deducts the Government tax paid on dividends $6,052.82, leaving a balance of $5,711.18, which deducted from the sum of $15,695.18 leaves $9,984.,

and the plaintiff credits for loss on Alton bonds, per Exhibit 17, $6,651.85, which deducted from sum last given leaves difference as stated, $3,332.15 Or, stated in another way, the plaintiff claims credit for items omitted by the defendant, profit and loss account $1,726.50 and interest on bonds $2,204.68, making $3,931.18; and the plaintiff credits loss on Alton bonds $6,651.85, and the defendant charges Government tax on dividends $6,052.82, which deducted from the last given amount leaves $599.03 to be deducted
2362 from $3,931.18 which leaves difference as stated $3,332.15.

Q. But for the fact that the defendant in its statement deducts the dividend tax, the Government tax on dividends $6,052.82, the excess of net earnings that year would be on the defendant's side—in the defendant's account rather than on the plaintiff's account, would it not?

A. Yes sir.

Q. Now, in 1864 if there was a difference you may state it and explain it, how it is arrived at. Give first the excess and on which side the excess is.

A. The excess is on the plaintiff's side and as given here is $28,550.67

Q. Now, give us the explanation of how that is arrived at.

A. In 1864, the evidence, pages 346 and following, shows the amount of the transportation earnings from which the operating expenses are deducted and afterwards the items of Government tax, State and county tax and interest and exchange are deducted, leaving at that point a balance of transportation earnings of $507,965.88 and from that is deducted, as appears by the evidence on cross-examination, certain items of additional expenditure amounting to $161,482.39; and that leaves a balance, as defendant shows it on Exhibit No. 60, of $346,483.49. In this item of additional expenditures as deducted is included a subscription to the bounty fund of $1,000, see profit and loss account Exhibit 48, the correctness of which plaintiff denies and claims that the balance of trans-
2363 portation should be $347,463.49. The defendant has deducted from transportation as above for interest and exchange $6,371.43. It should have been the balance of interest account, $1,218.92 and the difference between those two amounts should be added, it having been deducted by mistake, and that difference is $5,132.51. That makes the transportation earnings net, according to the plaintiff's theory, $352,636, and to this add the amount received from other sources as given, $41,001.38, which gives the total as stated $393,637.38. The defendant gives receipts from other sources, $40,001.38. This is obtained by deducting again the one thousand dollar bounty fund in the profit and loss account, which plaintiff does not recognize as a proper charge. That is to say, that thousand dollars was deducted from the transportation earnings and is again deducted from the other earnings.

Q. And if it be true that that is not a proper charge it neither — be deducted from the transportation earnings, nor should it be deducted from the other earnings.

A. The result of that situation would be that if it is a proper charge our statement should be $392,637.38 and if it is not a proper charge it should be $393,637.38 as given.

Q. And how about the earnings from other sources, if it is not a proper charge—in any event it could not be charged twice.

A. You have got the earnings from other sources in that
2364 $393,000. This makes a difference of $1,000. If it is recognized as a charge it should be $1,000 less than our statement. Now the difference in 1864, plaintiff's statement is $28,550.67 as it stands.

Q. The excess you mean?

A. The excess. The defendant deducts the dividend tax $27,769.39, and to this add the correct amount of interest and exchange account, $1,218.92, less the bounty fund item deducted from transportation of $1,000, leaves $218.92; and then add the same item to the defendant's "other revenue" statement, $1,000., which leaves difference $28,550.67 as stated. This account may be stated in another way. Defendant has the transportation revenue, his Exhibit 60, $346,483.49. He adds for interest and exchange deducted by mistake $6,371.43 He should have originally deducted that $218.92. Therefore he should add to the above transportation expense the difference, $5,152.51, and the bounty fund item deducted but objected to by plaintiff, one thousand dollars, which would leave $352,636; and add to this the revenue from other sources, $41,001.38, as given, making $393,637.38 as we have it, or if the $1,000 is allowed revenue from other sources, you add $40,001.38, which would make the total $392,637.38

Q. Now, if there is a difference in 1865 you may state the extent of the difference and on which side it is, and give an explanation of how it arises.

A. In 1865 the plaintiff's statement is more by $17,152.52 This is composed of an item deducted by the defendant from the
2365 transportation account, subscription to volunteer fund five thousand dollars and by a deduction of Government tax on dividends, $12,152.52 aggregating $17,152.52.

Q. Those two items make the difference

A. Make the difference.

Q. If there was any difference in 1866 you may state it, and how it arises.

A. In 1866 the difference is $12,36[illegible]23, the plaintiff's table being that much the larger, and it is a difference occasioned by deducting Government tax paid on dividends that year.

Q. In the defendant's statement?

A. In the defendant's statement.

Q. What difference if any was there in the year 1867, and how does it arise?

A. The difference in 1867 is $14,612.70 and arises in the same way.

Q. In 1868?

A. In 1868 the difference is $12,556.70 and arises in the same way.

Q. In 1869 if there was any difference state what it is, and upon which side of the account, and then give the details of the origin of it.

A. In 1869 the plaintiff's statement is $1,234.86 the larger, This year the plaintiff has transportation earnings $299,347.91, and the defendant has in Exhibit 60, $289,347.91; plaintiff's excess on transportation $10,000. This is the item in transportation account for 1869 charged to road repairs, station expenses and foreign agencies, for which the treasurer's book shows check to McKeen,
2366 to which plaintiff objected. The defendant has revenue from other earnings, on Exhibit 60, $88,173.45. I think there should be deducted from this an item of credit on the profit and loss account, Exhibit 48, page 9, for twenty per cent. of $30,000 C. & I. bonds, which is not an earning but is made to cancel an entry of November 30, 1867 of $10,000, and a further item arising from the accounts of material sold, and so forth which plaintiff does not consider an earning $11,321.84 making together $21,321.84 which leaves the amount of other earnings as given by plaintiff $66,851.61. The defendant deducts Government tax on dividends $12,556.70. The plaintiff claims the difference in transportation account $10,000, which makes $22,556.70; from which we deduct the difference between the two statements of revenue from other sources, $21,321.84, and we have the difference of $1,234.86 between the two statements accounted for.

Q. Now, if there was any difference in 1870 you may state what it is, and which account is the larger.

A. In 1870 plaintiff's account is the larger by $6,278.35, which is the amount of Government tax paid on dividend and deducted by the defendant.

Q. If there is any difference in 1871 you may state what the difference is and how it is arrived at.

A. In 1871 the difference is $27,610.23 in defendant's favor.

Q. What do you mean by "in defendant's favor"?

A. I mean the defendant's being the larger in that year.
2367 The defendant credits from other revenue, on Exhibit 60, $116,423.48, and the plaintiff has $79,637.18; excess of credit by defendant $36,796.30; and this arises from the item for sale of materials and so forth credited by the secretary on his report for that year as receipts, but not claimed by the plaintiff as earnings; and the defendant charges against that $9,176.07, which gives the difference as stated, $27,610.23.

Q. The $9,176.07 is on what account?

A. Government tax on dividends.

Q. If there was any difference in 1872 you may state it, and explain the source from which it comes, and on what side of the account the excess is.

A. In 1872 the excess is on the defendant's side, $3,922.60. The defendant gives on Exhibit 60, from other revenue, $79,758.18. If

you deduct from this the item for materials sold and so forth credited by the defendant, not considered earnings by plaintiff, $6,671.71, we have a balance of $73,086.47. Add an item for profit on sale of Star Union Line stock omitted by the defendant, $2,250, and we have the sum of $75,336.47 as given in plaintiff's statement, and that makes the difference, $4,421.71. Defendant charges Government tax on dividend $499.11 which leaves the net difference between the two statements $3,922.60.

Q. If there is any difference in the year 1873 will you state the extent of the difference, and on which side the excess is, and what is the occasion of it.

2368 A. The difference in 1873 is, on the statement, plaintiff's excess $41,525.50. The composition of plaintiff's statement is fully set out in the evidence introduced on the 20th of December. I did not have that evidence and I cannot give it now.

Q. The difference is in the plaintiff's statement of revenue from other sources.

A. Yes sir.

Q. What is the amount?

A. The plaintiff's statement *from* revenue from other sources is $75,935.30. The defendant gives $34,411.80.

Q. And the difference is that $41,525.50?

A. Yes sir.

Q. The details of that are in the evidence you gave the other day?

A. Yes sir.

Q. Now, I will ask you if you have prepared a table showing these differences and the explanation of them and references to the evidence upon that point.

A. Yes sir.

Q. I will get you to hand a copy to the reporter if you have one to be marked as an exhibit in this case.

A. I haven't any except my pencil memorandum.

Q. Here is one. I will ask you to hand such statement to the reporter to be marked as an exhibit in this case.

A. I do not think this has been compared.

Q. I think it has been. I will get you to hand such state-

2369 ment to the reporter and let him identify it as "Table F."

The table was marked by the reporter as "Table F, December 28th, 1899, Garber, Rep."

Mr. KETCHAM: If the master please, I offer this table in evidence.

The said table, marked "Table F, December 28th, 1899, Garber, Rep." was admitted in evidence and same is in the words and figures following, to-wit:

(See next page.)

2370 TABLE "F."

Difference between plaintiff's statement of net earnings, see evidence pp.—, and defendant's statement of same, as shown on Exhibit No. 60, to wit:

Year.	Pl't'f's a/c.	Def't's a/c.	Excess pl't'f.	Excess def't.
1858	161,519.43	163,845.24		2,325.81
1859	160,082.62	160,904.10		821.48
1862	352,287.44	348,246.25	4,041.19	
1863	316,570.48	313,238.33	3,332.15	
1864	393,637.38	365,086.71	28,550.67	
1865	362,536.27	345,383.75	17,152.52	
1866	326,913.30	314,546.07	12,367.23	
1867	468,641.71	454,029.01	14,612.70	
1868	430,443.38	417,886 68	12,556.70	
1869	366,199.52	364,964.66	1,234.86	
1870	278,720.54	272,442.19	6,278.35	
1871	336,988.96	364,599.19		27,610.23
1872	296,589.00	300,511.60		3,922.60
1873	103,403.26	61,879.76	41,523.50	

Total plaintiff's statement	4,354,533.29	
Total defendant's statement	4,247,563.54	
Balance	106,969.75	
Total plaintiff's excess		141,649.87
Total defendant's excess		34,680.12
Net difference		106,969.75

2371 In 1858. The defendant's credits—other earnings 2,700.70
The plaintiff charges from P. & L. a/c Ex. 48 ..... 374.89

Difference 2,325.81

This is composed of various items appearing on the credit side of P. & L. a/c as testified to by Duy—see page 512 of evidence.

Upon further examination of the P. & L. a/c it appears that the same amount was charged back to P. & L. a/c and credited to machine shop a/c and therefore that amount is omitted from plaintiff's statement of earnings—see evidence p. — leaving the correct amount $374.89.

We are unable to follow this into the machine shop a/c, and in my judgment the original credit of this $2,325.81 should have been to machine shop a/c instead of to P. & L. a/c, and the subsequent charge to P. & L. is to correct that error.

In 1859. Defendant credits the earnings a/c, 821.48—see evidence p. 514.

This is a legitimate credit, but on P. & L. a/c, Exhibit 48, there is a charge of $2,393.42 for loss on depreciated currency, and that year there is a balance of $2,098.94 charged to surplus a/c by which transfer the credit of $821.48 is wiped out, and we therefore omit it from our statement.

2372	In 1862. The plaintiff charges for other earning..		20,053.23
	And defendant credits Ex. 60.....		19,127.73
			925.50
	Which is the aggregate of two items charged to P. & L. a/c Ex. 48, for loss on M. & I. bonds and stock which the defendant deducts from the earnings, but which plaintiff does not admit should be so deducted, and that year defendant deducts also tax paid on dividend.....		3,115.69
	Which items together make the difference.....		4,041.19
	In 1863. Net charged from P. & L. Ex. 48.....		1,726.50
	And from surplus, Ex. 47.....		11,764.00
	And interest on St. L. A. & T. H. bonds, Ex. 17.....		2,204.68
			15,695.18
	Defendant credits.....	11,764.00	
	And deducts dividend tax.....	6,052.82	
			5,711.18
			9,984.00
	And plaintiff credits for loss on Alton bonds, as per Exhibit 17.....		6,651.85
	Leaving the difference.....		3,332.15
	Or stated in another form, the plaintiff claims credit for items omitted by defendant P. & L. a/c.....		1,726.50
	Int. on bonds.....		2,204.68
			$3,931.18
2373	1863 comt. Am't for'd.....		3,931.18
	Plaintiff credits loss on bonds.....	$6,651.85	
	Defendant charges dividend tax.....	6,052.82	
			599.03
	Difference as above.....		3,332.15
	In 1864 Transportation earnings are as appears from evidence, p. 346.....		1,007,979.21
	Deducting operating expenses.....		467,352.54
	Leaves.....		540,626.67
	Government tax, p. 352.....	$19,372.26	
	State & county tax.....	6,917.10	
	Interest & exchange.....	6,371.43	
			32,670.79
			507,965.88
	Additional expenditures.....		161,482.39
	Balance, as per Def't's Ex. No. 60.....		346,483.49

In "additional expenditures" as deducted is included "subscription to bounty fund" 1,000.00 P. & L. a/c Ex. 48, the correctness of which plaintiff denies and claims that the balance of transportation should be..		347,483.49
Defendant has deducted from transportation as above, for int. & exchange.....	6,371.43	
It should be (bal. of int. a/c).....	1,218.92	
And the difference should be added.....		5,152.51
Making transportation earnings net.....		$352,636.00
2374 For'd.....		352,636.00
And to this add the total revenue from other sources as given		41,001.38
Making net total earnings ..... as stated.		393,637.38
The defendant gives from other sources.....		40,001.38
Which is obtained by deducting again from P. & L. a/c the $1,000. Bounty fund item which plaintiff does not recognize as a proper charge.		
The difference in the two statements is		28,550.67
And this is accounted for by the "Div. tax" deducted by defendant.....		27,769.59
Adding the correct interest and exchange...	1,218.92	
Less the bounty fund item deducted from transportation..... ...	1,000,00	
		218.92
		27,550.67
And adding the same item to def't's other revenue.....		1,000.00
		$28,550.67
To state the account another way:		
Defendant has trans. revenue, Ex. 60..		346,483.49
He adds for int. & ex. deducted by mistake..	6,371.43	
He should have deducted.....	1,218.92	
Therefore he should add to the above.....		5,152.51
2375 And the bounty fund item, deducted but objected to by plaintiff		1,000.00
For'd		352,636.00

2376

1869.

Defendant has other earnings, Ex. 60		88,173.45
There should be deducted from this an item of credit in P. & L. a/c, Ex. 48, p. 9, for 20 % on $50,000 C. & I. bonds, which is not an earning but is made to cancel and entry of Nov. 30, 1867..	10,000.	
And an item arising from accounts of material sold &c. which plaintiff does not consider an earning	11,321.84	
		21,321.84
Which leaves the correct amount, as given by plaintiff		66,851.61
The defendant deducts tax on dividends		12,556.70
Plaintiff claims the difference on transportation		10,000.00
		22,556.70
From which deduct the above		21,321.84
And we have the difference of between the two statements accounted for.		1,234.86
1870. Difference is the tax on dividends		6,278.35
1871. Defendant credits other revenue, Ex. 60		116,423.48
Plaintiff has other revenue		79,637.18
Excess of credit by defendant		36,786.30

And this is from sale of material &c., credited by the secretary in his report for that year as receipts but not considered by the plaintiff as earnings.

2377 For'd		$352,636.00
And to this should be added revenue from other sources		41,001.38
Making a total of as plaintiff gives it.		393,637.38
In 1865. The difference is		17,152.52

And this is composed of an item deducted by defendant from transportation.

Sub. to volunteer fund	$5,000.00	
And tax in dividend	12,152.52	
		17,152.52

1866.	Difference is tax on div.....	12,367.23
1867.	" " "	14,612.70
1868.	" " "	12,556.70
1869.	The difference is 1,234.86	
	In this year plaintiff has transportation and earnings	299,347.91
	And defendant has Ex. 60.....	289,347.91
	Plaintiff's excess on transportation.....	10,000.00

Which is the item in transportation a/c for 1869, charged to road repairs, station expenses and foreign agencies, for which treasurer's book shows check to McKeen and to which plaintiff objects.

The defendant charges tax on dividend.....	9,176.07
Which gives the difference in statement.....	$27,610.23

2378

1872.

Defendant has from other revenue, Ex. 60.....	$79,758.18
Deduct from this material a/c credited by counsel but not considered earnings by plaintiff's counsel.....	6,671.71
	$73,086.47
And add profit on sale of Star Union Line stock not included by defendant.....	2,250.00
And we have the sum of..... ..... as given in plaintiff's statement.	75,336.47
And this makes the difference.....	4,421.71
Defendant charges tax on dividends.....	499.11
Which gives the net difference of..... as stated on page 1.	3,922.60

1873.

Plaintiff has revenue from other sources.....	75,935.30
Defendant.....	34,411.80
The difference is.....	41,523.50

The composition of plaintiff's statement is fully given in evidence introduced on Thursday Dec. 20th.

2379 Q. Now I will ask you if you have made a summarized statement of these differences, and if you have, I will get you to hand it to the reporter and let him identify it as table "G."

A. I think this will require a little explanation.

Q. I wish you would explain it then.

A. I have here in the first clause, speaking of statement No. 1, The figuring is correct on the theory of computation adopted except a slight error in the total of 1854 as noted on the margin.

What I have before me was a typewritten copy of this original. There is no notation on this.

Q. It is noted on the typewritten copy that was put in evidence.

A. No sir.

Mr. KETCHAM: Then I will withdraw that. It is all here anyhow. I will withdraw table "G"—all about table "G."

Q. Now, as I understand you in respect to your table F, the net excess of the net earnings from all sources on plaintiff's schedules was $106,969.75.

A. Yes sir.

Q. The total amount of Government tax on dividends is $117,137.48, is it not?

A. $117,137.48, yes sir.

2380 Q. If therefore the Government tax on dividends the defendant has deducted from net earnings were not deducted from net earnings the net earnings as given by the plaintiff would be nearly $11,000 less than those given by the defendant, would they not?

A. $10,167.73 less.

2381 Cross-examination.

Questions by JOHN C. WILLIAMS, Esq.:

Q. Mr. Duy on the basis that you give total net revenue for 1873 you show a total net revenue that year of over $800,000 do you not?

A. I do not recollect.

Q. Well you give the total revenue at over a hundred thousand dollars, don't you?

A. For 1873?

Q. Yes sir.

A. $103,000.

Q. That is for one-eighth of a year is it not?

A. That is what I gave it for the one-eighth of the year.

Q. That is on the basis of $824,000 for the year?

A. That includes a great deal of revenue that was earned, according to my idea, before 1873, as set out in Exhibit—I do not remember the number of it.

Q. It never struck you that that was nearly double what any net revenue had ever been before in the history of the company?

A. No, sir, it would not strike me so now, knowing the facts from which that is made up. It does not strike me so now.

Q. It does not strike you as being nearly double *don't* it?

A. It is in amount.

Q. Because it is nearly double the highest net revenue
2382 the company ever made, and it never occurred to you that you might have been mistaken and credited too much revenue to that year 1873?

A. Well no, I do not think it did. We went over the transportation revenue and I think agreed about that.

Q. Yes, it is in the revenue from other sources, if we disagree.

A. I stated that is set out in my evidence, where I got it from. Of course, I cannot say whether it is correct or not, except as I find it on the book.

Q. Well take for instance one item, the Terre Haute and Indianapolis Railroad Company had some Vandalia income bonds upon which no cent of interest had ever been paid as you testified, and they surrendered those bonds for preferred stock for the principal and interest of those bonds, and you have charged us with the preferred stock as an income in payment of that interest. Do you think that is an income?

A. I think that is what the books show.

Q. Do you think that that was an income? Do you think that preferred stock taken in payment of defaulted interest would be an income?

A. I think it is an earning.

Q. Do you think it would be an earning?

A. If it is paid. I don't know whether it is paid or not.

Q. The books don't show it was ever paid.

A. The books down as far as 1873 don't show it was ever paid.

2383 Q. But you charge it as if it was.

A. But they do show that after that there was a settlement made and the interest was added in and something taken for it.

Q. Preferred stock?

A. I don't know.

Q. And yet you charge it as if it was an earning?

A. Of course it was an earning, if it was interest accrued on bonds.

Q. Suppose it was never paid?

A. Then it was not an earning.

Q. Then if the preferred stock did not yield them that interest it was not an earning was it?

A. Certainly not, but the books show that up to a certain time the interest accrued on those bonds up to 1873 was counted in a settlement, and something else taken for it.

Q. And that something else was preferred stock?

A. I simply show that fact. I am not here to say whether it was an earning or not.

Q. That is al-right then?

A. I am simply putting down what the books show, and I fully explained that in my statement.

By Mr. KETCHAM:

Q. The books show in respect to that transaction that the Terre

Haute and Indianapolis road had assisted in building the Vandalia division of the road, and held its bonds, and in connection with that accepted the preferred stock, in lieu of second mortgage
2384 bonds that they had taken as the books show.

Mr. WILLIAMS: No, sir, no second mortgage bonds, excuse me Mr. Ketcham. They were income bonds.

A. Income bonds. That is all set out fully in the testimony.
Q. The books showed did they not, that the Terre Haute and Indianapolis road was operating the Vandalia road?
A. Yes.
Q. There are other items in that, among other things was an item of $12,750 for real estate sold, was there not?
A. Yes sir.
Q. And other items for amounts received from the Government for military transportation in previous years, but which had not gone into the books until that time?
A. Yes sir, I think so.
Q. And those items going in from past years, make this $103,000?
A. They make the large amount, they make the large revenue from other sources.

By Mr. WILLIAMS:

Q. You charged as revenue from other sources the total $12,500 received from real estate didn't you?
2385 A. $12,550, I think.
Q. You did not charge one-eighth of it?
A. No sir.
Q. You charged the whole amount?
A. Yes sir.

By Mr. KETCHAM:

Q. That is that was real estate, that the company had accumulated in previous years before its acceptance of the charter, and had it as representing the investment of the earnings of the company?
A. Yes sir.
Q. And then that investment came back in the shape of money. You did not distribute that?
A. I do not remember the date of that sale.

Mr. WILLIAMS: November 30th, 1873, it was charged on the book.
Mr. KETCHAM: No, it was February 1873.
Mr. WILLIAMS: It was sold and $6,000 received in cash and notes given for the balance, which were credited up as paid on November 30th, 1973.
Mr. KETCHAM: Those notes were credited up in 1873, but the cash payment was made in February as the books show.
2386 The WITNESS: That is the date of the sale.

Witness excused.

Mr. KETCHAM: The plaintiff is now ready to go to the master, on the 15th of January.

Mr. WILLIAMS: So is the defendant.

2387 Be it further remembered, that the foregoing evidence was all the evidence given upon the trial of this cause and upon said evidence the court made its rulings, hereinbefore set forth, upon the exceptions of the respective parties to said master's report, and upon the same evidence aforesaid the court also found for the plaintiff herein and assessed its damages at $913,905.01.

And the court having overruled defendant's motion for a new trial, herein rendered judgment against the defendant on said finding, and gave the defendant one hundred and twenty (120) days from the 27th day of October A. D. 1900, within which to present to the judge of this court its proper bill of exceptions, covering the rulings of the court on the said exceptions to said master's report, and embodying the evidence given upon the trial of this cause.

And, within the time so allowed, to-wit: on this the 20th day of February A. D. 1901, the defendant herein, now presents to the judge of this court its proper bill of exceptions, covering said rulings on exceptions and embodying all the evidence given upon the trial of this cause and prays that the same may be signed, sealed and made a part of the record herein. All of which is done this 20th day of February A. D. 1901.

(Signed) VINSON CARTER, *Judge.*

2388 And afterwards, to-wit: on the 23rd day of February 1901, being the 18th judicial day of the February term, 1901, of said court, before the same honorable judge, the following proceedings were had herein, viz:

Comes the plaintiff and tenders its bill of exceptions No. 4, and the said bill is now signed by the judge of this court and the same is now filed and made a part of the record, being as follows, to-wit:

Superior Court, Room 3.

STATE OF INDIANA *ex Rel.*, &c.,
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD Company. } No. 54555.

Plaintiff's Fourth Bill of Exceptions.

Be it remembered, that the following proceedings were had in the above entitled cause, before the Honorable Vinson Carter, one of the judges of said court, presiding in room No. 3, on Thursday the 19th day of April, 1900, the same being the 16th judicial day of the April term of said court, for the year 1900, to-wit:

The parties come, and the master commissioner, Noble C. Butler

theretofore appointed by the court, files his certain
2389–2434 report and finding, together — the affidavits, oral and documentary, adduced before him, the said finding, report and affidavits being as elsewhere appears of record, to-wit:
In the bill of exceptions filed herein, on the 20th day of February, 1901.

Thereupon afterwards, to-wit; on Saturday the 5th day of May, 1900, the same being the 30th judicial day of the April term of said superior court for the year 1900, the following proceedings were had in said cause before the honorable judge aforesaid, to-wit:
The plaintiff comes and files its exceptions in writing to the master's report, said exceptions being in the words and figures following to-wit:

* * * * * * *

2435 And be it further remembered, that upon consideration, on a hearing of said cause, and of the evidence so adduced, and of the master's report, together with the exceptions filed thereto by the parties respectively, the following further proceedings were had before the honorable judge aforesaid on the 27th day of October, 1900, the same being the 24th judicial day of the October term of said court, to-wit: The parties come, and the court being advised in the premises, does now overrule exceptions numbered one, two, four, eight, twelve, fourteen, fifteen, twenty-five, thirty-two, thirty-three, thirty-five, thirty-six and thirty-eight, taken and filed by said plaintiff to said master's report, and does now also sustain the exceptions numbered four and five filed by said defendant to said master's report on the 2d day of June, 1900, said exceptions appearing elsewhere of record in the bill of exceptions filed herein on the 20th day of February, 1901, to which ruling and action by the court in overruling the exceptions so filed by the plaintiff, and each and every of them separately and severally, and to the action of the court in sustaining said exceptions by the defendant, and each of them separately and severally, the plaintiff at the time excepts, and one hundred and twenty days' time was allowed it within which to prepare and file its bill of exceptions upon said rulings and each of them.

And be it further remembered, that thereafter, to-wit: on the 31st day of October, 1900, the same being the 27th judicial day of said court, the following further proceedings were had in said cause before the honorable judge aforesaid, to-wit: Said plaintiff files its motion for a new trial, which motion was thereupon by the court overruled, to which ruling the plaintiff at the time excepted,
2436 and one hundred and twenty days' time was allowed it within which to prepare and file its bill of exceptions thereon. And now on this 23rd day of February, 1901, and within the time allowed by the court, the plaintiff comes and tenders this its fourth bill of exceptions upon each and every of the above and foregoing

rulings. And thereupon it is ordered by the court that in lieu of incumbering the record with the filing of the evidence reported by the master, and the master's report thereon, the evidence and the master's report heretofore filed and made a part of the record upon the bill of exceptions of the defendant filed herein on the 20th day of February, 1901, shall be deemed and taken as though it had been filed in and made a part of this bill of exceptions of plaintiff as made. And thereupon, on this the 23rd day of February, 1901, the court having examined this bill of exceptions, does now allow and sign the same, and directs that it may be filed and made a part of the record herein, which is now on this 23rd day of February, 1901, done accordingly.

(Signed) VINSON CARTER,
Judge of Superior Court of Marion County, Presiding in Room No. 3 Thereof.

2437 STATE OF INDIANA, } ss:
County of Marion, }

I, George B. Elliott, clerk of the superior court within and for the county of Marion, State of Indiana, do hereby certify that the above and foregoing transcript contains true and complete copies of all papers and entries in said cause, being cause numbered 54,555 on the docket of said superior court, and entitled The State of Indiana on relation of William A. Ketcham, attorney general *vs.* The Terre Haute & Indianapolis Railroad Company.

In testimony whereof, I hereunto subscribe my name and affix the seal of said superior court of Marion county, Indiana, at my office in the city of Indianapolis, this 12th day of April, A. D., 1901.

[SEAL.] GEO. B. ELLIOTT,
Clerk Marion Superior Court.

2438 THE STATE OF INDIANA:

In the Superior Court, May Term, 1901.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY, Appellant,
vs.
THE STATE OF INDIANA on the Relation of WILLIAM A. Ketcham, Attorney General, Appellee. } No. —.

Appellant's Assignment of Errors.

The Terre Haute and Indianapolis Railroad Company, appellant in the above entitled cause, respectfully shows to the court that manifest error has intervened in the proceedings and judgment had and rendered in this cause in and by the superior court of Marion county, State of Indiana, to-wit:

1.

The court below erred in overruling the demurrer to the complaint.

2.

The court below erred in sustaining the demurrer to the second paragraph of the answer.

2439

3.

The court below erred in sustaining the demurrer to the fourth paragraph of the answer.

4.

The court below erred in sustaining the demurrer to the fifth paragraph of the answer.

5.

The court below erred in sustaining the demurrer to the sixth paragraph of the answer.

6.

The court below erred in sustaining the demurrer to the seventh paragraph of the answer.

7.

The court below erred in sustaining the demurrer to the eighth paragraph of the answer.

8.

The court below erred in sustaining the demurrer to the tenth paragraph of the answer.

9.

The court below erred in overruling the demurrer to the reply to the third paragraph of the answer.

10.

The court below erred in sustaining the demurrer to the eleventh paragraph of the answer.

2440

11.

The court below erred in overruling appellant's motion for a new trial.

12.

The court below erred in overruling appellant's exception No. 1 to the master's report.

13.

The court below erred in overruling appellant's exception No. 2 to the master's report.

14.

The court below erred in overruling appellant's exception No. 3 to the master's report.

15.

The court below erred in overruling appellant's exception No. 6 to the master's report.

16.

The court below erred in overruling appellant's exception No. 7 to the master's report.

17.

The court below erred in overruling appellant's exception No. 8 to the master's report.

18.

The court below erred in overruling appellant's exception No. 9 to the master's report.

2441

19.

The court below erred in overruling appellant's exception No. 10 to the master's report.

20.

The court below erred in overruling appellant's exception No. 11 to the master's report.

21.

The court below erred in sustaining appellee's exception No. 5 to the master's report.

22.

The court below erred in sustaining appellee's exception No. 6 to the master's report.

23.

The court below erred in sustaining appellee's exception No. 7 to the master's report.

24.

The court below erred in sustaining appellee's exception No. 9 to the master's report.

25.

The court below erred in sustaining appellee's exception No. 10 to the master's report.

26.

The court below erred in sustaining appellee's exception No. 11 to the master's report.

2442

27.

The court below erred in sustaining appellee's exception No. 13 to the master's report.

28.

The court below erred in sustaining appellee's exception No. 16 to the master's report.

29.

The court below erred in sustaining appellee's exception No. 17 to the master's report.

30.

The court below erred in sustaining appellee's exception No. 18 to the master's report.

31.

The court below erred in sustaining appellee's exception No. 19 to the master's report.

32.

The court below erred in sustaining appellee's exception No. 20 to the master's report.

33.

The court below erred in sustaining appellee's exception No. 21 to the master's report.

34.

The court below erred in sustaining appellee's exception No. 22 to the master's report.

2443

35.

The court below erred in sustaining appellee's exception No. 23 to the master's report.

36.

The court below erred in sustaining appellee's exception No. 24 to the master's report.

37.

The court below erred in sustaining appellee's exception No. 26 to the master's report.

38.

The court below erred in sustaining appellee's exception No. 27 to the master's report.

39.

The court below erred in sustaining appellee's exception No. 28 to the master's report.

40.

The court below erred in sustaining appellee's exception No. 29 to the master's report.

41.

The court below erred in sustaining appellee's exception No. 30 to the master's report.

42.

The court below erred in sustaining appellee's exception No. 31 to the master's report.

2444

43.

The court below erred in sustaining appellee's exception No. 34 to the master's report.

44.

The court below erred in sustaining appellee's exception No. 37 to the master's report.

45.

The court below erred in finding that there was due from appellant to appellee the sum of $913,905.01.

46.

The court below erred in finding that there was anything due from appellant to appellee.

47.

The court below erred in rendering judgment against appellant for the sum of $913,905.01.

48.

The court below erred in not finding and rendering judgment for the appellant.

Wherefore appellant prays that the judgment below be in all things reversed.

JOHN G. WILLIAMS,
SAMUEL O. PICKENS,
LAWRENCE E. MAXWELL, JR.,
Attorneys for Appellant.

Filed October 5, 1901.
R. A. BROWN, *Clerk.*

2445 And on the same day, to wit: October 5, 1901, comes now Robert A. Brown, clerk of the supreme court in and for the State of Indiana, and issues notice to the sheriff of the supreme court of said State, to be served on William A. Ketcham and Winfield T. Durbin, attorney general and governor, respectively, of the said State, which said notice, with the sheriff's return thereto, is in the words and figures following, to-wit:

The State of Indiana to the sheriff of the supreme court, Greeting:

You are hereby commanded to notify William A. Ketcham, attorney general, and Winfield T. Durbin, governor, that on the 5th day of October, 1901, the Terre Haute and Indianapolis R. R. Co. filed in the clerk's office of the supreme court of Indiana a transcript of the record and proceedings in a certain suit appealed from the Marion superior court, in which The State *ex rel.* William A. Ketcham, A. G. was plaintiff, and The Terre Haute & Indianapolis R. R. Co., *et al.*, were defendants, and notify said appellees, that at the expiration of thirty days from the date of service of this writ, said appeal will be submitted to said supreme court; and unless he appear at the supreme court room in Indianapolis, before said supreme court, and defend said appeal, the same will be proceeded upon in his absence. You are further commanded to make due return of this writ within ten days from date hereof.

Witness, Robert A. Brown, clerk of said supreme court, and the seal thereof, at Indianapolis, this 5th day of October, A. D. 1901.

[SEAL.] R. A. BROWN, *C. S. C.*

Came to hand 11 a. m. Oct. 5th, 1901.

2446 Served on the within William A. Ketcham by a true copy of the writ in the above entitled cause left with said William A. Ketcham, this 5th day of October, 1901. Served on the within Winfield T. Durbin, governor by reading to and within his hearing, this 10th day of October, 1901.

GEORGE W. WEIR, *Sheriff.*

2447 And afterwards, to-wit: on October 28, 1901, comes now the appellant, by counsel, and files its brief herein, which said brief is in the words and figures following: (Here insert.)

And afterwards, to-wit: on November 9, 1901, the same being the 143rd judicial day of the May term 1901, of said supreme court, the said court being fully advised in the premises, said cause is now submitted for decision, and notices thereof are duly issued.

And afterwards, to-wit: on January 7, 1902, come the appellees, by counsel, and file their assignment of cross errors herein, which said cross errors are in the words and figures following:—

THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY, Appellant,
vs.
THE STATE OF INDIANA on the Relation of WILLIAM A. Ketcham, Attorney General. } No. 19728.

Appellee's Assignment of Cross Errors.

The appellee in the above entitled cause, The State of Indiana on the relation of William A. Ketcham, attorney-general, assigns cross errors, and says that the court committed the following errors against the appellee, namely:—

1. The court erred in overruling appellee's first motion to amend and modify the judgment and decree in said cause.
2. The court erred in overruling appellee's second motion to amend and modify the judgment and decree in said cause.
3. The court erred in overruling appellee's third motion to amend and modify the judgment and decree in said cause.
4. The court erred in overruling appellee's fourth motion to amend and modify the judgment and decree in said cause.
5. The court erred in overruling appellee's motion for a new trial.

And the appellee prays that the court will consider and decide upon the cross errors by it assigned.

WILLIAM A. KETCHAM,
Special Counsel for the State of Indiana,
Attorney for Appellee.

R. O. HAWKINS,
R. S. TAYLOR,
FERDINAND WINTER, &
CLARENCE WINTER,
Of Counsel.

2448 And afterwards, to-wit: on February 4, 1902, come the appellees, by counsel, and file their petition for additional time to file briefs herein, which said petition is in the words and figures following: (Here insert).

And afterwards, to-wit: on February 5, 1902, come the parties by counsel, and the court being advised in the premises, grants appellees' petition for additional time to file brief herein, and sixty days' additional time is granted.

And afterwards, to-wit: on April 4, 1902, come the appellees by counsel, and file their brief herein, which said brief is in the words and figures following: (Here insert).

And afterwards, to-wit: on April 9, 1902, come the appellees, by counsel, and file their petition for additional time herein, which said petition is in the words and figures following: (Here insert).

And afterwards, to-wit: on April 10, 1902, comes the appellant, by counsel, and files its objections to appellees' petition for additional

time herein, which said objections are in the words and figures following: (Here insert).

And afterwards, to-wit: on April 11, 1902, the court being advised in the premises, grants appellee's petition for additional time herein; and being further advised, grants appellees leave to file briefs as of this date, said briefs to be printed on or before May 1, 1902.

2449 And on the same day, to-wit: April 11, 1902, come the appellees by counsel, and file their brief on the assignment of cross-errors herein, which said brief is in the words and figures following: (Here insert).

And afterwards, to-wit: on April 18, 1902. comes the appellant, by counsel, and files its reply brief herein, which said reply brief is in the words and figures following: (Here insert).

And on the same day, comes the appellant, by counsel, and files its petition for an oral argument in the above entitled cause, which said petition is in the words and figures following: (Here insert).

And afterwards, to-wit: on April 24, 1902, comes the appellant, by counsel, and files its petition for an extension of time herein, which said petition is in the words and figures following: (Here insert).

And afterwards, to-wit: on April 25, 1902, the court being advised in the premises, grants appellant's petition for an extension of time herein, and the same is extended to May 10, 1902.

And afterwards, to-wit: on April 25, 1902, come the appellees, by counsel, and file their brief in support of the cross-errors herein, which said brief is in the words and figures following: (Here insert).

2450 And afterwards, to-wit: on May 2, 1902, come the appellees, by counsel, and file their suggestions and additional authorities herein, which said suggestions and additional authorities are in the words and figures following: (Here insert).

And afterwards, to-wit: on May 9, 1902, comes the appellant, by counsel, and files its brief on appellees' assignment of cross-errors herein, which said brief is in the words and figures following: (Here insert).

And afterwards, to-wit: on May 26, 1902, come the appellees, by counsel, and file their petition for an order of the court on the petition for oral argument heretofore filed herein by the appellant, which said petition is in the words and figures following: (Here insert).

And afterwards, to-wit: on May 27, 1902, come the parties by counsel, and the court being advised in the premises, sets the above entitled cause for oral argument on June 17 and June 20, 1902, two hours each day being allowed for said argument, points and authorities to be furnished opposite counsel herein.

And afterwards, to-wit: on June 3, 1902, comes the appellant, by counsel, and files its special points for oral argument herein, which said points are as follows: (Here insert)

2451 And on the same day, to-wit: June 3, 1902*m* comes the appellant, by counsel, and files additional authorities herein, which said additional authorities are in the words and figures following: (Here insert).

And afterwards, to-wit: on June 7, 1902, come the appellees, by counsel, and file their special points for oral argument, which said points are in the words and figures following: (Here insert).

And afterwards, to-wit: on June 13, 1902, come the appellees, by counsel, and file their petition for leave to file additional authorities herein, which said petition is in the words and figures following: (Here insert).

And afterwards, to-wit: on October 4, 1902, come the appellees, by counsel, and file additional authorities herein, which said additional authorities are in the words and figures following: (Here insert).

And afterwards, to-wit: on November 25, 1902, the same being the 2nd judicial day of the November term 1902 of said supreme court, the following further proceedings were had, to-wit:

Come the parties by counsel, and the court being advised in the premises, affirms the judgment of the court below, with the following opinion pronounced by Hadley, C. J., with a concurring and dissenting opinion by Jordan, J., which said opinions are in the words and figures following:—

2452 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1902.

On the 25th day of November, 1902, being the 2nd judicial day of said November term, 1902.

Hon. John V. Hadley, chief justice. Hon. Leander J. Monks, Hon. John H. Gillett, Hon. James H. Jordan, Hon. Alexander Dowling, justices.

In the case of—

THE TERRE HAUTE & INDIANAPOLIS Railroad Company	}	No. 19728. Appeal from the Marion (54555) Superior Court.
vs.		
STATE *ex Rel.* WILLIAM A. KETCHAM, A. G.		

Come the parties by their attorneys, and the court being sufficiently advised in the premises gives its opinion and judgment as follows, pronounced by Hadley, C. J.

Concurring and dissenting opinion, Jordan, J.

2453 Suit by appellee for an accounting to the use of the common schools, for earnings in excess of amount authorized by law.

The facts material to the decision of the case not disclosed in the

opinion are these: The General Assembly by an act approved January 26, 1847 (Local Laws 1847, p. 77) constituted a number of gentlemen named, and their successors in office, a body corporate and politic under the name of "The President and Directors of the Terre Haute & Richmond Railroad Company" with full power to construct and operate a railroad from a point on the western line of the State of Indiana, and running thence eastwardly through Terre Haute, Greencastle and Indianapolis to Richmond in Wayne county. The authorized capital was $800,000, which might be increased if found necessary. The corporation might borrow money but no power was given to mortgage its property, and if the directors contracted debts beyond the amount of the good solvent subscription to the capital stock, such directors should be personally liable. The corporation might fix its own rates for the transportation of freights and passengers, and when the stockholders should receive as dividends an amount equal to the full sum invested, and ten per centum per annum, the legislature might then regulate the tolls, and all net profits thereafter accruing, above a sum sufficient to pay fifteen per cent. dividends, and to meet future contingencies should be paid to the treasurer of State for the use of the common schools.

In 1851 the corporation was authorized to mortgage its property to raise money for construction and equipment, and at the same session (L. L. 1851, p. 80) upon solicitation of its officers the company was relieved from the construction of that part of the proposed road east of Indianapolis. In 1865 the corporation name was changed to "The Terre Haute & Indianapolis Railroad Company" which name it still retains. The road was opened to traffic in the fall of 1851 between Terre Haute and Indianapolis. Improvements, however, were continued through the years 1852, 1853, 1854 and 1855 and to November 30, 1856, when the construction account was declared closed. The company commenced paying dividends to its stockholders in 1852 and in every year thereafter to 1873 when it surrendered its special charter and organized under the general railroad laws of 1852, paid regular and large extra dividends. About the close of 1872 the prosecuting attorney of Putnam county instituted a *quo warranto* proceeding in
2454 the Putnam circuit court to forfeit the charter of the company. On a change of venue to Owen county a trial was had which resulted in a disagreement of the jury. Pending this action a written agreement was entered into between the State and appellant, which stipulated that a suit should be brought in the Marion superior court for any money claimed to be due the State, and if it should be determined in said suit that nothing was due the State from appellant, then the *quo warranto* action in the Owen circuit court should be dismissed, and if it should be found that money was due the State the sum so found should be paid before the dismissal of said suit. Pursuant to this agreement the State *ex rel.* the attorney general brought suit against appellant in the Marion superior court in 1875. The complaint contained three paragraphs. The first and second para-

graphs sought to recover money due the common school fund under the twenty-third section of appellant's charter; the third paragraph sought to recover money paid by the State to appellant, for the transportation of troops and munitions of war. Appellant filed a demurrer to each paragraph of that complaint for insufficiency of facts and each of said demurrers was sustained—the judges filing a written opinion in which they purported to state the grounds of their judgment. The State refusing to amend, judgment was rendered in favor of the company on the demurrers. On the State's appeal to this court the judgment of the superior court was affirmed in 1878 on the ground of irregularity, and insufficiency of the record. State *ex rel.* Attorney General *v.* T. H. & I. R. R. Co., 64 Ind., 297. In 1897 the legislature passed three acts—one approved January 27th, to require appellant to account to that body pursuant to section 23 of its charter, for the amount expended in construction and operation of its road from January 26, 1847, to January 17, 1873, and the total earnings, profits, etc., for that period. One approved February 24th purporting to amend said original section 23, so as to require the excess of profits paid over to the treasurer of State semi-annually on the first Monday of July and December; and the third approved March 4th providing for an accounting to the use of the common schools, authorizing the attorney general to demand such accounting and to institute suit upon failure so to do. Acts 1897 pp. 8, 59 and 145. The appellant neglecting to render an account and pursuant to this latter legislation this action was commenced in April, 1897. The complaint is in one paragraph reciting the above and other
2455 material facts with much elaboration. A demurrer for want of facts was overruled, and appellant answered in eleven paragraphs. The first was a general denial. The second set up the legislative consent of 1851 to the company's abandonment of the construction of that part of the proposed railroad lying east of Indianapolis, and appellant's acceptance of the general railroad law of 1852 in bar of the State's right to recover. The third plead the judgment in the Marion superior court of 1876 as a former adjudication. The fourth was an argumentative denial. The fifth, sixth, seventh, eighth, ninth and tenth presented the statute of limitation in various forms,— the ninth that the cause of action accrued more than twenty years prior to the 19th day of September, 1881. The eleventh, acquiescence and *laches* on the part of the State, in bar of the action. A demurrer was sustained to each paragraph of the answer except the first, third and ninth. A reply was filed to the third and ninth. Upon the closing of the issues the case was referred, over the objection of appellant, to a master commissioner to hear and report to the court the evidence, together with his findings of fact and conclusions of law thereon. Exceptions were filed to the master's report, by both plaintiff and defendant, and upon final hearing by the court, judgment was given the plaintiff for $913,905. A new trial was denied the defendant, and it appeals. Errors and cross errors are assigned on all adverse rulings.

The State's action is based upon the obligations assumed by appellant in the acceptance of its original charter of 1847, or it has no case. This in effect is conceded by the State's counsel. An effort of the General Assembly, by amendatory legislation in 1897, to create in the State a right in the earnings of appellant where none existed before, or to impose upon appellant any new charter liability, or obligation, would be so clearly unconstitutional as to leave no ground for argument. We are, therefore, inclined to dismiss the first contention with the observation that in so far as either of the acts of 1897, *supra*, attempts, if either does so attempt, to increase the liabilities, or impose any new burden upon, or in any way change the obligations of appellant, the same is invalid, and the respective rights and liabilities of the parties must now be determined by their contractual relations entered into in 1847, in the same way as if the legislation of 1897 had never been enacted. How-
2456 ever, as we read the complaint and understand the theory of the State, the late legislation is appealed to only as providing a remedy for enforcing the pre-existing charter obligations of appellant, and to this extent it is valid. Cincinnati etc. Co. *v.* Clifford, 113 Ind. 460–466; Webb *v.* Moore, 25 Ind. 4; Hopkins *v.* Jones, 22 Ind. 310–315.

We pass then the legislation of 1897 as being out of the case, except as conferring certain powers upon the attorney general and as defining the procedure, whereby the claims asserted by the State, as arising under the original charter, may be fully and fairly contested with appellant. The sections of the charter important in this inquiry are these:

"SEC. 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road, or any part thereof, as shall be for the interest of said company, and to charge, lower or raise at pleasure: Provided, that the rates established from time to time shall be posted in some conspicuous place or places on said road.

"SEC. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving (reserving) such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of the State for the use of the common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

"SEC. 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday

in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount that the net profits after deducting all expenses; and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper. * * *

2457 "SEC. 35. The corporation shall cause to be kept a fair record of the whole expense of making and repairing said railroad, and of each section thereof, with all the incidental expenses, and also a fair account of the tolls received; and the State shall have the right to purchase stock of said company, at any time after twenty-five years, by paying to said corporation a sum of money which, together with the tolls received, shall equal the cost and expenses of said railroad as aforesaid, with an interest of ten per centum per annum; and the books of said company shall always be open for the inspection of any agent of the State, appointed for that purpose by the legislature, and upon any refusal to exhibit their books and accounts to said agent, upon request made to the president, all powers granted by this act shall cease."

Section thirty-five was repealed by the act of February 16, 1848, but we deem it useful here in the interpretation of other sections.

Three important questions arise upon the construction of these sections, and chiefly under § 23. (1) Does said section impose upon appellant any obligation to pay any portion of its net earnings to the State in the absence of legislation regulating its tolls and freights? (2) What is meant by the term "full sum invested"—the sum subscribed and paid in by the stockholders, and such of the bondholders as elected to convert their bonds into stock, and thus become stockholders, or the full cost of construction and equipment of appellant's road without reference to whether the money employed was taken from the surplus earnings of the corporation, or directly contributed by the shareholders? (3) Was an action maintainable by the State for surplus earnings before a demand for an accounting had been made and refused?

I. The first of these questions involves the sufficiency of the complaint. It is averred therein that the legislature never regulated the tolls and freights to be charged by appellant, and the question is—Was such regulation required by the charter as a condition precedent to the State's right to the earnings in excess of the amounts specified? It is obvious from the sections quoted that the law makers had in mind a scheme which contemplated, not only liberal profits to investors, but as well, security to the public against extortion, and a contingency in which the common school fund should become entitled to share in the profits of the enterprise. The provisions of these sections may be better understood by looking at them from the point of view held by the legis-

2458 lators at the time of their enactment. Since the occupation of the Territory the people of the State had sorely felt the need of highways as means of intercommunication, and for reaching the markets. At that time perhaps more laws had been passed

by the legislature relating to roads than had been passed upon all other subjects combined, and to meet the still pressing demand the State in 1836 had undertaken a general system of public improvements which provided for the construction of many highways, including turnpikes, canals, and railroads. This venture on behalf of the State had proven disastrous, and all work begun thereunder had been abandoned as early as 1842, leaving the State with a prostrate credit, and unsupplied with necessary highways.

Furthermore—popular education had also been a matter of chief concern. In the organization of the State government in 1816 the people had declared, as a part of their fundamental law, for a public school system in which instruction should be free and equally open to all. (Article 9 § 2.) Subsequent legislation in accord with the constitutional requirement had given unmistakable prominence to the desirability of free schools. Most, if not all the financial resources of the State other than taxation had been and were being appropriated to the accumulation of a permanent fund for the maintenance of such schools. Here then we find the legislature confronted with a popular demand for more highways, and a more ample school fund. The State could neither build roads, nor appropriate school funds. She had no money and no credit. Private capital must be induced to engage in such enterprises.

Railroads as freight carriers were at the time attracting prominent attention. Massachusetts had led in 1826 in the construction of the first railroad in America, the same being a line from Quincy to tide water, and so rapidly had such roads arisen in favor, that in 1847 there were in successful operation more than 5,000 miles of railroad in the Eastern and South Atlantic States. Am. Cyclop. vol. 14. Our own State had felt the impulse of railroad building. No less than twenty-five charters for the construction of railroads had been previously granted, but none had proceeded to completion. In 1836 in its great system of internal improvements, the State had provided for the construction of a railroad from Madison to Lafayette, via Columbus, Indianapolis and Crawfordsville, thus opening up to general markets, through the Ohio river, and the Wabash and Erie canal, three populous
2459 and fertile sections of the State. The latter work was entered upon, but the State finding that it had undertaken more than it was able to accomplish, in 1843 turned over to a private corporation, the incompleted portion between Madison and Indianapolis. The receiving company's president, in February, 1846, reported to his board of directors, that the road still lacked thirty miles of reaching Indianapolis. It was probably completed in that year. So it may be assumed that the legislature of 1847, convening so shortly after the opening of the first railroad in the State, while in a mood to give friendly consideration to the proposals of a body of men to build, with their own money, a railroad through another important section of the State, yet the members were undoubtedly without the necessary data as to cost of construction and equipment, expenses of operation, and earnings, of railroads, to enable them to

settle upon definite terms and franchises, fair alike to the corporation and the public. There existed reasons, too, why an east and west line across the State from Terre Haute to Richmond should be regarded as the most profitable line in the State, for a railroad. The route for the entire distance paralleled the "National road" a great thoroughfare previously constructed by the Federal Government, eighty feet wide from Maryland to the Mississippi river, thus furnishing the rapidly increasing population of the seaboard a spacious highway into the broad and fertile regions of the West. Along this only way the stream of emigration had flowed for several years. Cities, towns, and populous communities had gathered along its borders. New settlements sought continuity with it. National attention had been drawn to it as the only highway between the East and the West under the fostering care of the National Government. The proposed new railroad was thus to run along the channel of direct commerce and communication, as fixed by Congress, between the Atlantic and Mississippi valley, and would be the first to enter the open door of the great prairies of Illinois.

At any rate when the subject came up the legislators were not so swerved by their enthusiasm for railroads as to make reckless concessions to the incorporators, for liberal as they were required to be, and were, to induce the investment of private means in a novel venture, it is very plain that they had, from present considerations of some character confidence enough in the ultimate profits of the enterprise to set a limit to the corporation's money making.

2460 The paramount consideration doubtless was such a scheme as would attract private capital. Here are some of the inducements held out to investors: *a.* The company was to have at the beginning of business, unrestrained power to charge such rates for the transportation of freights and passengers, as seemed to it to be to the interest of the company; and power to raise and lower such rates at pleasure. (§ 22.) Under this power it could have been pointed out that the managers of a railroad, susceptible of easy and inexpensive construction, linking the West to the East, tracing the thickly inhabited border of the National road, touching at the State's capitol, could unquestionably so adjust its tariffs as to meet the requirements of a satisfactory investment.

b. In effect the State proposed to suspend the exercise of its sovereignty, and allow the company to continue uncontrolled and uncontrollable in its exactions from the people until the investors had received back as dividends the full sum invested and ten per centum per annum thereon, and to thereafter continue, in perpetuity, to charge and collect such tolls as would net them two and one half times the legal rate of interest.

c. The State guaranteed that the company should enjoy, in perpetuity, the right to charge such tolls as it liked, upon failure of the builders to receive back, as dividends, the full sum invested, and ten per centum thereon, and if at the end of twenty-five years (§ 35) the State elected to purchase the road it could do so only by paying

the stockholders the full *cost* of the road and ten per centum thereon.

d. The State should never, even after the builders had been fully reimbursed, interfere in the matter of charges, so as to reduce the profits of the stockholders below fifteen per centum per annum.

The legislature was not free to do as it would. It had to do the best it could. The State's effort at making public improvements had irretrievably failed. Private capital must be enlisted, or the people do without railroads. The best offer to make was one that would promise investors the speediest and surest return of their money, and to that end give them the most absolute control of the means by which the money was to be made. That accomplished, other interests might then be protected. So it was provided (§ 23) that when the stockholders had been reimbursed, and had received back all they had put in, and ten per centum per
2461 annum thereon, and still retained their shares, the State should then become entitled to resume its sovereignty, and the cherished school fund afforded a chance for enlargement. The language is that when the money invested and interest had been fully returned "the legislature may so regulate the tolls and freights that not more than 15 per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses, and receiving (reserving) such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of State for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of 15 per centum per annum cannot be made."

The situation of the legislature was unique. The fiscal depression that followed the collapse of the State's recent undertakings had not been restored. The people were clamoring for better ways of reaching the markets. The expenses and earnings of a railroad were problematical. How generally the people would patronize the road, was only conjectural. The profits might be small or very large. One seemed as probable as the other, and when the inducements had been made sufficiently strong to assure the investment of private capital on the basis of small profits,—then, on the basis of possible large profits, there arose the twofold duty of protecting the people from continued wrong and oppression, and to secure for the State something valuable for the large franchises granted. Reasonable capitalists would not hesitate to accede to such terms when it was provided that they should operate only after the investors had received back all their investments with interest largely in excess of the legal rate. With these various interests, objects and purposes in view the plan outlined in § 23 was adopted.

At least three reasons appear for believing that the intention was that the stockholders should not, after becoming reimbursed for their out-lay, at any time, or under any conditions, have more of the net earnings than fifteen per centum per annum of the sum invested: *First.* The irrevocable right to fifteen per centum, expressly conferred, negatives a right to more. Second. The faithful account

of construction, of expenses and receipts, required by §§ 23 and 35, and the mandatory language employed in disposing of "the surplus" implies the contemplated existence of a substantial balance. It seems entirely improbable that the legislature intended the mockery of providing for the payment to the school fund of
2462 the fraction remaining after that body had adjusted the tariffs of the company, so that the net earnings should be just fifteen per centum of the shareholders' investments, no more and no less. *Third.* It is clear that the lawmakers considered that under their liberal grant, the time might come when the corporation would be receiving larger profits than were just, and when that time arrived, if ever, any earnings in excess of fairness should be relinquished by it. The limitation that entered into this consideration is stated as affecting the periods both before and after full reimbursement of the builders, and it seems incredible that the legislators should deem it expedient to declare their sense of what was just and fair to the shareholders, and State, dispose of the excess over the limit fixed by them, and then provide, or leave for construction, that the company's right to the unjust excess should accrue by legislative inaction on the subject of regulating its tolls.

But it is argued that the statute required the legislature to regulate the tolls and freights of the company, as a condition precedent to the State's right to the earnings in excess of fifteen per centum, and in support of the contention it is insisted that "may so regulate" as used in § 23 should be read "shall so regulate." We are unable to accept the argument as sound. If "may" should be construed as mandatory, when shall the legislature begin to act? The statute says "when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon" shall be the time when the legislature may begin regulating the tolls. It is certain, however, that conditions might be such at that time, and even after for that matter, that the legislature would have no power to act. The stockholders might have reached reimbursement by earnings less than fifteen per centum per annum, and the time might never come when they earned so much as fifteen per cent. per annum, and hence the power to regulate, declared to exist, would be, and might ever continue to be, without the right of exercise, and therefore a nullity, for it is expressly provided in the same section "that the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of 15 per centum per annum cannot be *be* made." The legislature will not knowingly command a thing to be done that is impossible of accomplishment; nor will it wittingly command a thing to be done that ought not to be done.

Perchance it might happen when the time came that the
2463 stockholders had received back their full investment and were continuing to receive more than fifteen per centum per annum, that the State ought not to change the established and prevailing rates of the company. It should be borne in mind that the right to regulate was primarily intended for the protection of the

people. All the protection the people were entitled to was fair rates as compared with the rates elsewhere charged on other roads over the country. The railroad company might find from experience that the friendship of the communities traversed was valuable, and that the interests of the company lay in such fair rates as would invite business and stimulate trade. So when the legislature became entitled to interfere it might find a schedule of rates in force by the company that was perfectly fair and perfectly satisfactory. In such case will it be said that it was meant that the legislature should change it?

Then again, as we have seen, the proposed road would occupy a route of exceptional advantages for business—advantages apparently so favorable that a schedule of charges fair and necessary on other railroads in the State, might upon this prove sufficient to produce an income in excess of fifteen per centum. In such case was it intended to make it the duty of a subsequent legislature to reduce the rates of the company to the lowest point at which fifteen per centum could be made? It is the duty of the State to treat its citizens alike, and to see that others who exercise public powers do the same. So when the State should undertake to regulate the tariffs of its railroads, it must make such tariffs uniform. It could not require the people between Indianapolis and Terre Haute to pay one mileage rate, and the people between Indianapolis and Madison to pay another. If the legislature should find such facts existing with respect to rates, when the State regained its power of supervision, there would exist not only no duty to change the rates it found in force, but it would be wrongful to change them. Will it do to believe that it was meant by the legislature in the adoption of appellant's charter, or so understood by the incorporators at the time of the acceptance, that if it should turn out that fair rates formulated and established by the company, should produce more net profits than fifteen per cent. of the investment, the State must go through with the form of adopting and enacting into law the same fair rates, to acquire a right to the surplus? The intent of the law, is the law.

2464 The reasonable and true interpretation of the provisions under review seem to be: *First*, that the matter of regulating the tolls and freights of appellant, at any permissible time, rested solely in legislative discretion; *second*, the incorporators were absolutely limited in the profits of the enterprise, to the full sum invested and ten per cent. per annum thereon, and thereafter to an annual dividend of fifteen per centum upon the capital employed; *third*, when the stockholders had received the limit, the surplus, if any, remaining after the payment of expenses, and reserving such an amount as shall be necessary for future contingencies, should be paid over to the treasurer of State for the use of the common schools without reference to whether the legislature had, or not, previously regulated the tolls and freights of the company. "A doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation." Common-

wealth *v.* Erie etc. Co., 27 Pa. St. 339–351; Holyoke *v.* Lyman, 82 U. S. 500–511; Covington etc. Co. *v.* Sanford, 164 U. S. 578; Stroudbridge Canal Co. *v.* Wheeley, 2 B. & Ad. 792; 4 Thompson on Corp. § 5661.

II. A spirited controversy prevails upon what is meant by "the full sum invested" and "capital employed" as used in § 23. The State's insistence is that the term embraces only such sums as were contributed directly by those who purchased the corporation stock for the construction of the road, and the sum paid for bonds that were issued and used for construction, and subsequently converted, under their provisions, into shares of stock—amounting in the aggregate to $1,216,690. On the other hand appellant insists that the term means—the full *cost* of the construction and equipment of the road—whether contributed directly by the stockholders or taken from the earnings of the road—amounting in the aggregate to $1,988,150. If the State's contention is right there was received and appropriated by appellant, in excess of the amounts to which it was entitled under its charter, a large sum of money, and if appellant's contention is right, it received no more money that it was entitled to retain. In the solution of this question we should again turn to 1847, and consult the history of the time. We should find that modern methods of railroad promotion and construction were unknown at that period. It was then understood that the only way to get a railroad, was for those desiring it to get together the money and build it, as they would buy a farm. Bonds predicated on future values,
2465 and incomes, and construction companies distinct from the principal corporation, were unknown attributes of railroad construction. It is clear that the General Assembly assumed that the entire cost of construction would be subscribed and furnished by the stockholders, except such sums as might be received as gifts and donations. The act fixes the capital stock at $800,000 and prescribes the manner in which it should be subscribed and paid. It authorizes county commissioners of counties traversed by the road, to subscribe for their county such an amount of stock as they would deem proper. (§ 26.) If the capital granted should prove inadequate to accomplish the work intended, the corporation might increase it. (§ 31.) If the directors contracted debts over and above the amount of good and solvent stock subscribed they should be personally liable for the excess. (§ 36.) The work should commence within five years after the opening of the books, and should proceed towards the point of destination as might be within the ability and for the interest of the company, and should be completed within fifteen years. "Provided, also that if any part of the said road shall be completed within the time aforesaid, in that case, all the rights, priveleges and benefits granted in this act shall be extended to, and vested in said company to such part of said road as shall be completed." (§ 19.) The act did not originally authorize the company to issue bonds or mortgage its property for any purpose, but such power was subsequently conferred by amend-

ment. (Acts 1851 p. 28.) The company was empowered to receive by donations, gifts, grants or bequests, land, money, labor, property, stone, gravel or other materials. (§14.) The improvement was to be made by the co-operation of interested parties along the line,—counties as well as individuals—who for the money they put in, should have a certificate as evidence of the amount of their contributions. If persons along any part of the line, more liberal or more able than others, should succeed in completing that portion of the road, the full rights and benefits of the charter should apply to the completed portion the same as to the entire line if completed. The thing in mind was to get the road completed as far as possible, and to make certain the security, for the money put in to carry forward the improvement to that point of completion when it would serve the purpose of its construction. Profits or surplus earnings of an enterprise, so difficult at attainment as the road was supposed to be, could hardly have been reckoned upon as "money in-
2466 vested" or as "capital employed." The purpose was to provide the best possible security to capital that chanced the success of the venture, and not to remunerate capital that was earned after the success of the venture had become assured. It was the money put in, that made profits and dividends possible, that was to receive the special favor of the law, and be returned with ten per centum per annum. In popular sense "the full sum invested" and "capital employed,"—which are clearly used here as synonymous terms, usually means an original sum placed upon a venture with a view to profits, or an income. If one had $1,000 and with it purchases railroad, or other stocks, it will be said that he has invested $1,000. He has also acquired rights in the corporation other than a claim for money. He, to the extent of his investment, has become a part of the corporation, and a joint owner of its assets. If he receives and uses the annual profits of his stock, or if there are none, his investment is still $1,000. If he permits the annual profits or accretions to remain and accumulate with the company, in whole or in part, the investment remains $1,000. It can make no difference in the status of the profits whether he uses them himself, or allows the company to use them.

The money that was to be restored as "the full sum invested" was to be returned as "dividends declared" by the corporation. Dividends are declarable, and payable, only to stockholders, hence the only returnable money contemplated was that going to stockholders, and we must assume, only to such stockholders as the legislature had in mind as contributors to the capital required in the first construction of the road. It was believed then that the capital required for the building and equipment of the road for practical use as a railroad, as they were then being constructed, and operated, was the limit of capitalization. Such capital was the only money that would be subjected to any special hazard, or would deserve any special safeguarding, and there is apparent, not the shadow of a reason why the lawmakers should grant any special favoritism to

surplus earnings of the road, subsequently expended by the corporation, in permanent improvements and extensions.

We find further evidence that the legislature did not use "full sum invested" and "cost of the road" as equivalent terms. In § 35 it is provided that if, after twenty-five years the State shall elect to purchase the road, there shall be paid to the stockholders, not
2467 the full sum invested or capital employed, but "a sum equal to the *cost* and expenses of said railroad with an interest of ten per centum per annum."

The aggregate amount of stock issued by appellant, and which it insists represents the cost of construction and the full sum invested is, $1,988,150.

Of this amount appellee disputes as properly belonging to the full sum invested, within the meaning of § 23, the following items:

Stock dividend November, 1856	$211,600.
Stock dividend April, 1864	376,700.
Stock issued on account of bonds paid	50,000.
Stock issued on account of bonds lost	5,000.
Stock donated to Chancey Rose	6,000.
Stock donated to John Rose	10,000.
Interest & discount included in stock	112,159.95
Total	$771,459.95.

In the annual report of the president of the road filed January 17, 1853, appears the following statement: "The road is amply equipped for the present, but will have to be increased in the coming season to enable us to meet the anticipated increase of business."

It thus appears that the road was in successful operation and amply equipped for current business, four years before the first stock dividend was issued, hence no part of such stock could have represented an investment of the stockholders for construction. While the company had the right to appropriate from the earnings all necessary and proper operating expenses, including ordinary improvements, replacements and repairs, whatever amount was earned in excess of such expenses, was pledged to the liquidation of the sum invested and ten per centum thereon, and as against the State no part of such expenses could be capitalized. It was never contemplated that earnings, in any form, should become a part of the full sum invested in the sense that they should be returned with ten per cent. interest, and thereafter be entitled to fifteen per cent. annual dividends. Such reasoning leads to an absurdity.

There is less foundation for the stock dividend of 1864. The record shows that no charge was made to construction account during the eight years from 1856 to 1864, and hence the stock dividend of the latter date was simply a capitalization of the expense account that had been paid from the earnings. Will it be said this
2468 should be done as against the State? If it should, when will the time come and what shall the earnings be to accomplish a

return of the capital and ten per cent. interest? It is certain that if the sums expended for betterments and improvements are to be considered, the construction of the road will never be completed, for the necessity for such things grow out of the operation of the road and will continue to arise as long as the road is operated.

The bond transactions have no greater merit. It appears that the company in the ordinary course of business had from its earnings paid off $50,000 of its outstanding bonds which had not been surrendered for stock as they might have been. When the company had paid its own debt with its own money that was the end of the matter. The transaction was an operating expense and entitled to no other status. The issuing of the stock for the lost bonds was of the same general character.

Ten thousand dollars in stock was issued to John Rose for services, "for which he makes no charge," and $6,000 to Chancey Rose, on some unstated account, which if a legitimate allowance was also an operating expense, and should not be counted in estimating the amount to be returned to stockholders.

It appears that interest was allowed to subscribers to the capital stock upon all payments made in advance of the time when payments could have been called for by the directors. The stock was for less than its face value. Bonds were also sold at a discount. Certificates of stock were issued to subscribers without deducting the interest and discount allowed, and to the bondholders, upon the converting of their holdings into stock, for the full face value of their bonds, without deducting the discount received, aggregating the sum of $112,159.95. This interest and discount was not capital invested in the improvement. It represented a sum that never in any way entered into the construction of the road, or into the assets of the corporation. It was an expense representing the cost of procuring the money for construction, nothing more nor less.

These sums deducted leaves the capital stock, which rightfully represents the full sum invested in the construction of the road at $1,216,690. See Mobile, etc., R. Co. *v.* Tenn., 153 U. S., 486–496; State *v.* Manchester, etc., Co., (N. H.) 48 Atl. Rep., 1103.

III. It is set up in the third paragraph of answer that on
2469 the 28th day of May, 1875, the plaintiff herein instituted a suit against this defendant, in the superior court of Marion county for the recovery of money; that the defendant appeared, and on the 8th day of June, 1875, filed its demurrer to the complaint therein; that on the 6th day of March, 1876, the demurrer was sustained, and thereupon the plaintiff failing and refusing to amend, elected to stand by its complaint, and final judgment was thereupon rendered, in the defendant's favor, May 9, 1876; that the judgment thus rendered was, by the plaintiff, appealed to, and affirmed by the supreme court; that the matters adjudicated in said cause were and are the same identical matters sued for in this action. The pleadings disclose that the complaint in the Marion superior court contained no averment of conversion or a previous demand upon the defendant for an accounting as to its earnings under the provisions

of § 23 of its charter. It is insisted that for this omission the complaint in the former action was essentially bad, and hence there could be, and was no adjudication upon it.

It is undoubtedly the general rule that in ordinary obligations to pay money, it is the duty of the obligor, within the time of performance, to hunt his creditors up and pay or tender the sum owing, without a request or demand so to do, if he would escape costs of suit. But there are a great many cases, which if not exceptions to the rule, are at least not governed by it, wherein, if money alone is due and owing to another, and the amount thereof definitely known, or ascertainable from the facts within the knowledge of the obligor, it is essentially necessary to make a demand before an action can be maintained. Some of these cases follow. Generally persons who come rightfully into the possession of funds in trust for others, are entitled to a request, as agents, trustees and bailees. Armstrong *v.* South, 3 Blackf. 251.

Attorneys at law for money collected by them. Black *v.* Hersch, 18 Ind. 342.

For the recovery of bank deposits. Bank etc. *v.* Merchants etc., 91 N. Y. 106; Brahm *v.* Adkins, 77 Ill. 263.

For the recovery of dividends declared by corporations. 2 Morse on Banks & B. § 708; Hager *v.* Union Bank, 63 Me. 509; Scott *v.* Central R. etc., 52 Barb. 45.

Where one makes a contract with another to pay the debts
2470 of the latter, before an action can be maintained against the former by a creditor, a demand of payment is necessary. Durham *v.* Bischof, 47 Ind. 211.

Where a general agreement is made to share future expenses, which are indefinite, no action will lie in favor of either party against the other, until they have accounted, or until the account has been presented and its adjustment demanded. Hayes *v.* Morrison, 38 N. H. 90.

These are instances enough to show that the general rule is properly confined to narrow limits, and that a great mass of cases rest upon their own particular facts. It may be said that a demand is necessary in all cases, where, from the peculiar nature of the transaction, the party to be charged may reasonably expect it, not from the known or reputed forbearance of the premises, but from facts that exist in the case, which naturally and usually influence persons in like situations to give notice. As, an agent, attorney, bailee, or trustee having had the right of possession conferred by another may reasonably expect to continue in possession until its surrender has been requested by the party conferring or entitled to it. A banker to avoid damage from unnecessary annoyance and costs is entitled from general custom to a request to pay before an action will lie against him for a deposit. So a corporation that has declared a dividend of profits among its stockholders, cannot be sued until it has been requested and given a fair opportunity to pay without suit. All these, and other like cases are grounded upon the princip*al*, that the obligor is ready and willing to perform at the

convenience and pleasure of the obligee, whenever that pleasure is signified, and that fairness and good conscience require notice before legal proceedings shall be begun.

"There is indeed respectable authority" says Blackford, J., in Sheets *v.* Anderson, 2 Blackford 274, "for the opinion, that it would have been better had the law required a demand previously to a suit, even in cases where money only had been contracted for;" and that eminent jurist declares that the policy of the law in dispensing with a demand, where money only was promised, having been thus questioned, should be accepted as strong ground to show that the rule excusing a demand upon the obligor for performance, should be applied with great caution in all other cases.

2471 There was something more in this case than a simple obligation and promise to pay money. As a condition precedent to any duty to pay or account for money received, certain collateral things were to be done that could be accomplished only by the co-operation of both parties to the contract. The railroad was to be built, money must be earned, expenses paid, repairs and ordinary improvements made, the sums contributed by the builders for the construction and equipment must be restored, a sufficient sum to meet future contingencies reserved, and a fifteen per cent. current dividend provided. All the money the company should receive in the operation of its road from the beginning should be its property, much, or little. The right of the State at no time attached to any part of the earnings until after the company had paid its operating expenses, refunded the investment, set apart a sum for future contingencies, and provided a fifteen per cent. dividend on its proper capitalization. When these things were all done, if surplus profits remained, the duty of the company then arose to pay such surplus, as a surplus, to the treasurer of State. But how was it to be known when these things were accomplished, and when liability to the State arose without some basis or rule established, or agreed to by the parties for making the estimate? Will it be seriously contended that the General Assembly conferred upon the corporation power to arbitrarily settle for itself and for the State, what should constitute the "full sum invested?" What operating expenses, and what a reasonable sum for future contingencies? If it did, in the doing of it, it must have known that it was sheer folly to provide for the payment of a surplus to the State. To hold that it was given over to the company to conclusively resolve as against the State after the road was put in operation, that all betterments, extensions, and extraordinary improvements paid for from the earnings, and bonded indebtedness incurred for construction but paid from the profits, and divers other items that represented not a dollar used in the construction of the road, may be, at the pleasure of the company, capitalized, counted, and refunded, as a part of the "full sum invested" within the meaning of § 23, is equivalent to holding that it was the legislative intent to place it wholly within the power of the corporation to defeat the State's right, by avoiding the accumulation of a surplus.

The facts of this case illustrate the absurdities to which
2472 such a construction of the statute will lead. As we have heretofore seen, the company used in the construction of the road ready for business, subscriptions to its capital stock and the proceeds of negotiated bonds afterward converted into stock by the holders, the sum of $1,216,690, which sum was the investment meant by § 23 as entitled to reimbursement, and upon which a fifteen per cent. dividend should thereafter be paid. The road was opened for business in the autumn of 1851. The company commenced declaring and paying dividends in 1852 and in the words of appellant's counsel, "continued from that time until this investigation closed in 1873, to pay semi-annual dividends every year of its existence in large amounts, ten per cent., additional, and extra ten per cent., additional and extra seven and eight per cent." For obvious reasons arising while the road was pursuing its extraordinary career the capital stock was increased by dividing among the shareholders as stock dividends in 1856,—$211,600; in 1864,—$376,700, and by issuing on divers other accounts, heretofore set forth in a table, amounting in all to—$771,460, predicated upon a disbursement of profits and replacements, betterments and extensions, five and thirteen years respectively after the road began business, thus making the total issue of stock $1,988,150, and which is now claimed by appellant to be the "full sum invested," and which must be returned and receive a fifteen per cent. dividend before the State becomes entitled to anything. If this claim is to be allowed the stockholders' investment may be enlarged by a like process as often, and whenever, the exigency of absorbing increased profits arise, and thus effectually prevent a recovery by the State.

It is clear that the legislature never intended that the corporation should have its own way with respect to what should constitute "the full sum invested," what proper operating expenses, and other fit matters of accounting, for the right to require an accounting, which implies the right to have it made on a fair and just basis, is expressly reserved. And while these grounds of settlement remained unadjusted, and in controversy, and the initiative rested upon the State, and the question of whether the company owed the school fund, remained problematical, and depended solely upon the rules that should prevail in the settlement, no duty rested upon the
corporation to pay any sum to the treasurer of State, and
2473 no right of action rested in the State for the recovery of money, with, or without a demand. The duty to account when required, as imposed by § 23, means nothing more, nor less, than the duty to settle and pay over to the treasurer of State, any surplus disclosed, when requested or demanded by the legislature to do so.

It is probable that the right of the attorney general, or the treasurer of State to demand an accounting would have been implied, if the law had been silent. But there is no basis for an inference here. A specific provision for an accounting, and to whom it shall be made, having been written in the law, no other can be implied. A public officer is a creature of the statute and has no power but that

expressly conferred, and necessarily implied to enable him to carry out some specific duty, and if at any time down to 1847, the attorney general, treasurer, or other officer of State, had, attempted to settle, and give a quittance to appellant, the act would have been void, and would have concluded no one. McCaslin *v.* State, 99 Ind. 428, 439; Platter *v.* Board, etc., 103 Ind. 360–378; State *v.* Portsmouth Bank, 106 Ind. 435–451.

We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the General Assembly. This request was not made until 1897, and no actionable default by appellant had occurred prior to that date.

a. The former complaint was insufficient for another reason. Said complaint was in three paragraphs. The third being for the recovery of money wrongfully paid the company by the State for the transportation of troops and munitions of war, in violation of its charter (§ 30) need not be noticed. In the first paragraph it is alleged that the company's charter was passed January 26, 1847, that the company accepted and organized under the charter but it is not averred when; the total amount invested by the company "was and is" $1,300,000, but it is not stated when the investment became that sum; the company accepted the general railroad law January 17, 1873; the total amount of net earnings of the road from the beginning had been $8,000,000, but it is not shown outside of an exhibit filed with the complaint, how much of the earnings was received before January 17, 1873. The exhibit purports
2474 to show only the gross net yearly earnings. To have recourse to it, in support of the complaint, we must find that the exhibit is the foundation of the action; and surely we cannot do this. Standing alone the exhibit does not even tend to show a right of action in the plaintiff. The action was not upon an account, nor to recover net earnings, but clearly its foundation was the agreements and covenants found in the charter. State *v.* Helms, 136 Ind. 122; Fuller *v.* Cox, 135 Ind. 46; Bayless *v.* Price. 131 Ind. 437.

These indefinite averments tested by the rule that they must be construed most strongly against the pleader, and we have a case showing that sometime between 1847, and the filing of the complaint (May 1875) the capital invested amounted to.. $1,300,000.

As we are not informed when it was, we will assume that it was the midway period between 1847 and 1873, or July 1, 1860.

Before the State became entitled, there must be returned, not only the principal sum invested, but ten per cent. per annum, thereon, for twelve and one-half years, to-wit	1,625,000.
And also fifteen per cent. per annum for the last half of the period	2,437,500.
Total	$5,363,500.

We are uninformed how much net earnings was received before the company gave up its special charter in January, 1873, except as we may infer from the amount of net earnings shown to have been expended, as follows:

Invested in various bonds and stocks	$3,000,000.
Surplus fund	2,000,000.
Bonds converted into stocks	50,000.
Bonds lost and stock issued therefor	5,000.
Total	$5,055,000.

Which sum is $307,500 less than the company was entitled to receive before the State's claim would attach.

The second paragraph by an application of the same rule of construction, shows equally plain, that nothing was then recoverable by the State. It was not shown in this paragraph that the company had ever accepted the general law, and hence we must assume
2475 that it was still operating under its original charter. Like the first it alleges that the charter was granted in 1847, and was accepted, but no time being stated, we will assume that its acceptance was also in 1847. It is alleged that the full sum invested in construction and equipment was $1,344,000, and beyond an averment that it amounted to that sum in 1867, and has since then continued that sum, the paragraph is silent as to when that sum was reached, and we are again at liberty to assume that it was all furnished in 1847, when the charter was accepted.

Still further like the first there is no averment of how much had been the net earnings of the company, except so far as it may be presumed from the allegation that the company had of the net earnings appropriated and invested in bonds and in its own and other railroad stocks, and retained, over necessary contingent expenses, the total sum, of various items set forth, $5,855,702.

Being without information from the complaint as to when the net earnings were sufficient to pay the full sum invested, and ten per centum per annum thereon, we are again free to assume that the road began earning money in 1848, and that its aggregate net earnings had reached a sum equal to the capital invested and ten per cent. thereon by the middle period between 1848 and 1875 (when the complaint was filed) thirteen and one-half years, and then the account stands thus:

Capital invested	$1,344,000.
Ten per cent. on the capital for 13½ years	1,814,400.
Fifteen per cent. dividends on the capital for the last 13½ years	2,721,600.
Total amount to which the company was entitled before the State's claim attached	$5,880,000.

Which shows that when the former suit was commenced the company lacked $24,298 of receiving the amount of profits it was authorized to retain.

Thus we have seen that the complaint of the attorney general filed in the Marion superior court in May, 1875, failed to exhibit a cause of action for two reasons. Appellant's demurrer to the complaint in said former suit, for insufficient facts, was sustained, and judgment was rendered on the complaint against the State.

b. Upon the state of facts the further contention arises.
2476 Was the judgment thus rendered upon a bad complaint, conclusive, or susceptible of being made conclusive by extrinsic evidence? It is the law everywhere that whenever a matter is adjudicated and finally determined by a competent tribunal it is considered as forever at rest. It may also be said to be a well established rule that a judgment for the defendant, on demurrer to the complaint, by reason of the omission of an essential allegation therein will not bar a subsequent suit upon a complaint in which the omitted allegation is supplied. Stevens *v.* Dunbar, 1 Blackf. 56; Estep *v.* Larsh, 21 Ind. 190; Griffin *v.* Wallace, 66 Ind. 410–417; Gould *v.* Evansville etc. Co., 91 U. S. 526; Russell *v.* Place, 94 U. S. 606; Terry *v.* Hammond, 47 Cal. 22; Tracy *v.* Merrill, 103 Mass. 280; Gerrish *v.* Pratt, 6 Minn. 14; Carmony *v.* Hoober, 5 Pa. St. 305; Radman *v.* Michigan etc. Co., 59 Mich. 595; Birch *v.* Funk, 2 Metcalf (Ky.) 544; Railway Co. *v.* Brown, 23 Fla. 120; Moore *v.* Dunn, 41 Ohio St., 62; Keiter *v.* Hock, 16 Iowa 23; Wells *v.* Moore, 49 Mo. 229.

Upon the same principal a judgment against a plaintiff because his action is prematurely brought is no bar to a suit subsequently brought after the cause of action has properly accrued. Griffin *v.* Wallace, 66 Ind. 410–418; Roberts *v.* Norris, 67 Ind. 386, 392; Indianapolis etc. Co. *v.* Clark, 21 Ind. 150; Chicago etc. Co. *v.* State, 153 Ind. 134–143; Bracket *v.* People, 115 Ill. 29; Seaton *v.* Hixon, 35 Kan. 663; Wood *v.* Faut, 55 Mich. 185.

c. It is, however, very earnestly contended by counsel for appellant, that if the superior court gave judgment upon the merits of the case, even if the complaint was deficient, the law and the facts entering into such judgment, cannot be further called in question, and that since the record is silent as to the grounds of the judgment, the court below erred in refusing to admit in evidence the written opinion of the judges who sat in the case, to show that the judgment was, in fact, upon the merits, and not upon the form of the complaint. We concede that a judgment for the defendant on a demurrer to a complaint, that has been well brought, whether it involves pure questions of law, or both law and fact, the general effect is to conclude the parties thereby. And when such a judgment may rest upon more than one theory, or upon more than one class of facts, extraneous evidence—even of what the judge said in pronouncing the same—may be properly allowed, to show, to
2477 what extent, and upon what particular subjects the adjudication should operate. But it is illogical to say that there may

be an adjudication of the merits upon a complaint that fails for want of form, or substance to state any merits, for there can be no merits where there exists no cause of action. As said in the Moore case, 41 Ohio St. at page 64: "A judgment for a defendant on demurrer to a petition which does not state a cause of action determines nothing, only, that the facts alleged were not sufficient to constitute a cause of action. The determination, therefore, does not reach the merits of the case, and does not conclude the plaintiff in a future action in which sufficient facts are alleged." "Such a judgment" says the learned judge in summing up in Radman's case, 59 Mich. 595, *supra*, "is not a bar to a second suit founded upon the same transaction, if the new declaration states a cause of action. The merits of plaintiff's case cannot be said to have been adjudicated when his declaration fails to state a case, or any merits." The doctrine of these cases is especially applicable to suits brought before the right of action has matured. It is too much to say that there can be an adjudication of a claim before it has accrued, or become actionable, and while there remains something to be done by the plaintiff to consummate his right to sue; and as a general rule supported by sound reason, and as in harmony with the great mass of decided cases relating to the conclusiveness of judgments, it may be affirmed that where an action is prematurely brought because the plaintiff has not done all incumbent upon him to do, to put himself in a position to legally call upon the defendant to perform his contract, a judgment against the plaintiff in such action will not bar a subsequent action after full performance by the plaintiff, and the same duly alleged.

That is this case. When the attorney general commenced the suit of 1875, the State had no right of action against appellant, and whether it ever did have a right to sue, depended upon the refusal of appellant to account when requested to do so by the legislature. The judgment of the court in sustaining the demurrer to the complaint in that case was clearly right, and the process of reasoning by which the right result was reached is wholly immaterial. State *v.* Hyde, 129 Ind. 296, 306; Burke *v.* Table Mountain etc. Co., 12 Cal. 402, 408.

Besides there might have been, in the opinion of the court, more than one reason why the plaintiff should fail, and it was con-
2478 tent in the expression of one. There is nothing in the record to indicate that the court adjudged the action as timely brought.

2. The fact that the action in the Marion superior court was the result of an agreement by the State and appellant to submit the question of appellant's liability to that court, makes no difference. The agreement was to submit the validity of the State's claim upon the facts as they existed at the time, not as they would be after more profits were received, and after a demand for an accounting had been refused. The evidence rejected, was, therefore, not material, and if admitted would not have benefitted the appellant. Hence its exclusion was not harmful.

3. The second paragraph of answer pleads an amendment of appellant's charter in 1851, (Acts 1851 p. 80), and appellant's acceptance in 1873 of the general railroad law of 1852 in bar of the State's right to recover. The chief argument being that the effect of the amendatory act of 1851 was to annul the old corporation and create two new ones, one to build the western, and the other the eastern part of the road, without renewal of the obligations imposed by §§ 22 and 23 of the old charter. Appellant's original charter authorized the construction of a railroad from the western line of the State through Indianapolis to Richmond in Wayne county. The amendments of 1851, relied upon, recites that upon the solicitation of the president and directors of the Terre Haute & Richmond Railroad Company, it is enacted that said railroad be and the same is hereby terminated at Indianapolis, and the said president and directors of said road are hereby released and discharged from the construction of any part of said road east of Indianapolis.

By the same act another corporation was created, styled the "Indiana Central Railway Company," with authority for the stockholders to meet and elect directors who shall organize a board, and elect similar officers to the Terre Haute & Indianapolis Railroad Company, and who shall take the same oath, possess the same power, and discharge the same duties with the directors and officers of the Terre Haute & Richmond Railroad Company. And said new company is authorized to construct a railroad, in the general direction of the national road from Indianapolis to the east line of the State, "and shall possess the same rights, privileges, and immunities, and be subject to the same restrictions and liabilities, as said Terre Haute & Richmond Railroad Company;" and the said act, and all its amendments incorporating the Terre Haute & Richmond
2479 Railroad Company are declared to be also the charter of the Indiana Central Railway Company as far as applicable.

There is not a suggestion anywhere in the amendatory act, that appellant was to be relieved of any of its duties and obligations, beyond the construction of the eastern portion of the originally proposed railroad; nor is there a suggestion anywhere that the old corporation of 1847 was to be dissolved, and two new ones organized, one to construct the western, and the other the eastern portion of the contemplated road. To the contrary, the conferring upon the Indiana Central Railway Company, the same rights, privileges, and immunities, and the same restrictions and liabilities as were then possessed and resting upon the Terre Haute & Richmond Railroad Company, gives rise to the clearest inference that the old company was to continue possessed of all its original charter rights and obligations, the same as if it had not given up the building of a part of the proposed road. The amendment shows upon its face that appellant wished a riddance of building the eastern portion, and made of the General Assembly a request to that effect, and it is a strange law that would turn the solicited favor into a discharge from onerous duty, by implication. The acceptance in 1873 of the general railroad law of 1852 had no effect in relieving

appellant from unperformed duties, assumed in its charter contract of 1847. The demurrer to the second paragraph of answer was properly sustained.

4. It is set up in paragraphs five, six and seven of the answer that the plaintiff's cause of action accrued more than six, fifteen, and twenty years respectively "*prior to the commencement of this suit*," and in paragraph eight, that so far as the complaint sought to recover money claimed to be due prior to 1866, the cause of action accrued more than fifteen years before the 19th day of September, 1881. Paragraph nine averred that as to all claim for money due before September 19, 1861, the cause of action had accrued more than twenty years before September 19, 1881, and paragraph ten that the cause of action accrued more than six years before September 19, 1881. The demurrer was sustained to the fifth, sixth, seventh, eighth and tenth answers, and overruled as to the ninth.

By the statutes of 1852 (§ 224) it was provided that "limitation of actions shall bar the State of Indiana * * * as other persons."

This section was in force till the taking effect of the revision
2480 of 1881, on the 19th day of September, 1881, which provided (§ 304) that "limitations of actions shall not bar the State of Indiana except as to sureties." The chief debate upon these answers is as to whether appellant's charter shall be held to be a contract in writing, or as resting in parol. If a contract in writing an action upon it will be barred which had been running twenty years, (§ 211, clause 5, R. S. 1852) next before September 19, 1881, (§ 304, *supra*) and if not in writing, after the lapse of six years next before September 19, 1881. It is sufficient to say that the fifth, sixth and seventh paragraphs are all bad for pleading the statute as operating to the time of the commencement of this suit, April 22, 1897, sixteen years after the statute had ceased to run against the State. The fifteen year statute pleaded in the eighth was inapplicable,—the ninth paragraph was held good, and the real question arises upon the tenth. We are unable to concede the contention that appellant's charter is a contract "not in writing," and that there is nothing more in the case than a simple claim for money. It is not essential to a contract in writing that it be signed by both parties. The signature of one with acceptance by the other of the benefits stipulated, constitutes a written contract. Midland Ry. Co. *v.* Fisher, 125 Ind. 19; Harlan *v.* Logansport etc. Co., 133 Ind. 323; Indianapolis Gas Co. *v.* Kibbey, 135 Ind. 357; Thieband *v.* Furniture Co., 143 Ind. 540; Leach *v.* Rains, 149 Ind. 152.

By the act of 1847 certain named persons were constituted the appellant corporation. The terms and conditions upon which the gentlemen named, and their successors, might exercise corporate rights and privileges are specifically set forth; and the rights and liabilities of both the corporation and the State, are definitely fixed. The act was duly executed by the grantor of the benefits by being passed by the General Assembly, and signed by the proper officers of State. Nothing in connection with its terms and conditions, rest in parol. The parties, as well as all the terms and stipulations can

be gathered from the instrument itself. Parol evidence is not competent to explain, or vary, its provisions. It is absolutely its own proof of all it confers and requires, in a stricter sense than is applicable to other written instruments. We find no element of parol contract about it.

2481 *a.* There is no force in the argument that to constitute the charter a written contract binding on both parties, its acceptance must also appear in writing. The public and notorious exercise of the powers and rights conferred is proof enough of acceptance. See authorities last above cited. The act itself declares that it shall be deemed and taken as a public act. (§ 37.) Appellant was named in the act as the only party entitled to its benefits, and under its terms appellant elected officers, exercised the right of eminent domain, took possession of real estate, constructed a railroad from the west line of the State to Indianapolis, became a busy common carrier of freight and passengers, fixed its own tolls, appropriated its revenues, and six times within the first four years of its existence went into the legislature, and procured in its own corporate name, by amendments, extensions and modifications of its charter rights and duties; and it is shown by the act of 1865 (Acts 1865 p. 89), a public law, of which we must all take notice, passed fifteen years after some person or corporation had accepted the charter of 1847, and had constructed the railroad authorized thereby from Terre Haute to Indianapolis, that appellant again appeared before the General Assembly and procured legislation, which provided that "the name and style of the company, incorporated and known, as the President and Directors of the Terre Haute & Richmond Railroad Company under an act of January 26, 1847, be changed, and that said company shall hereafter be known by the name and style of the Terre Haute and Indianapolis Railroad Company." And further, "As said company has completed so much of said railroad as lies between Terre Haute and Indianapolis within the time authorized by the act incorporating it * * * and as said company has not completed so much of said line as lies between Terre Haute and a point on the west line of the State, within the time prescribed, the said company under the name and style of the Terre Haute and Indianapolis Railroad Company shall have seven years' further time to complete their railroad from Terre Haute to the western line of the State." Under these facts the court could not, if it would, close its eyes to the identity of the party that exercised the rights and enjoyed the benefits stipulated in the act of 1847. We therefore hold that said charter act is a written contract between the State and appellant, and the tenth answer insufficient. Western etc. Co. *v.* Citizens St. R. Co., 128 Ind. 525.

2482 This case is not of the class to which The Board etc. *v.* Shipley, 77 Ind. 553, and The Board etc. *v.* Crockett, 111 Ind. 316, relied upon by appellant, belong, and hence the latter cases cannot be accepted as authority. Each of these cases is grounded on a general order of the board of commissioners for the payment of bounties to induce enlistment into the army. In the

Shipley case, the order directed the auditor to draw his warrant in avor of each volunteer, enlisted, sworn, and mustered into the U. S. fservice, and credited to the county. More than six years thereafter Shipley brought an action against the county to collect the sum offered, alleging that he had enlisted and was mustered into the U. S. service, and credited to the county. The order in these cases amounted to nothing more than an offer. Until the offer was accepted by some one it was not a contract; and whether there was an acceptance, an enlistment, a muster in, a credit to the county, and who the party was, could only be established by extrinsic evidence. It was held in these cases that a contract brought about in this way rested partly in writing and partly in parol, and must be regarded as a contract not in writing. The distinction between these and the case at bar, is obvious.

5. The fourth answer in general terms, and the eleventh specially, pleads knowledge, acquiescence, and *laches* on the part of the State in bar of the action. The argument in support of these answers is that the contract by which the State had a right to participate in the profits of appellant, was an ordinary business contract outside the domain of sovereignty and in making the contract the State submitted itself to the same laws that govern individuals. We are unable to accept this argument. A sovereign, as such, has a right to name the conditions upon which it will grant another the right to exercise a public power; and to require the payment of money, in a contingency, that may arise, as a means of preserving equality among those exercising like franchises, and to prevent excessive profits, is not an abdication of sovereignty, or an entrance into the domain of commerce within the meaning of the cases cited by appellant.

Appellant is a *quasi* public corporation. Its charter was a matter of public record equally open to all. The nature and basis of the State's claim was accessible to all dealers in its stocks and bonds. The action in *quo warranto* in Owen county, in 1874, and the suit in the Marion superior court in 1875, were public proceedings, and the legal effect of the orders and judgments, was equally known
2483 to all. That there has been much procrastination is beyond dispute, but a wise public policy has long since forged the rule, now everywhere adhered to, that the State shall not be made to suffer from the delays, or negligence of its public officers. United States *v.* Kirkpatrick, 22 U. S. 720, 735; Crane *v.* Reeder, 25 Mich. 303, 320; Farish *v.* Coon, 40 Cal. 33, 50; State *v.* Beviers, 86 N. C. 588, 592; Wallace *v.* Maxwell, 10 Tredell, (N. C.) 110, 112; Gibbons *v.* U. S. 8 Wall 269; People *v.* Brown, 67 Ill. 435.

"It is a familiar doctrine" says the court in the last cited case, "that the State is not embraced within the statute of limitations, unless specially named, and by analogy, would not fall within the doctrine of estoppel. Its rights, revenues, and property would be at fearful hazard, should this doctrine (estoppel) be applicable to the State. A great and overshadowing public policy of preserving these rights, revenues, and property, from injury and loss by the

negligence of public officers forbids the application of the doctrine. The doctrine is well established that no *laches* can be imputed to the Government, and by the same reasoning which excuses it from *laches*, and on the same grounds, it should not be affected by the negligence, or even wilfulness of its officials."

6. Appellant has assigned errors calling in question the action of the court in overruling certain of its exceptions, and in sustaining certain of appellee's exceptions, to the master's report. The exceptions relate to specific facts and conclusions stated in the master's report. There was no request by either party for a special finding, and the question arises, whether the action of the trial court upon the several exceptions to, and items of, the master's report and its conclusions of law stated thereon is anything more or less that a special finding under the statute, made without request so to do.

It has become well settled in this State, since the code of 1852, that a written finding of special facts and conclusions of law thereon, made by the court without a request from either party, amounts to nothing more than a general finding, and an appellate tribunal has no right to regard such unauthorized findings for any purpose other than as a general finding. Sheets *v.* Bray, 125 Ind. 33; Jacobs *v.* State, 127 Ind. 77; Nelson *v.* Cottingham, 152 Ind. 135.

As before stated, there appears in the record what purports to be the trial court's finding and conclusions of law on divers ex-
2484 ceptions filed by both the plaintiff and the defendant to the master's report without a request by either party for such finding.

This action was brought for an accounting and is therefore a suit in equity (Field *v.* Brown, 146 Ind. 293), and it becomes necessary for us to inquire whether the above rule applies to trials in suits in equity of this class as well as to trials in actions at law.

The evident purpose of our practice code was to sweep away the useless forms and fictions of the old practice, in courts of equity, as well as in courts of law, and to abridge, simplify, and cheapen remedial procedure in both jurisdictions. That both courts are subject to the same general rules, is declared in the first line of the code, to-wit: "There shall be no distinction in *pleading* and *practice* between actions at law and suits in equity." (§ 249 Burns 1901.) Further along in the scheme of reform it is provided, (§ 412), that "issues of law and issues of fact in causes, that prior to June 18, 1852, were of exclusive equitable jurisdiction, shall be tried by the court * * * provided that in all cases triable by the court as above directed, the court in its discretion, for its information, may cause any question of fact to be tried by the jury, or the court may refer any such cause to a master commissioner, for *hearing* and *report*." Attention is called to five things in this latter statute: (1) the subject in equity causes; (2) the trier is termed "the court;" (3) issues of law and issues of fact in such cases, shall be tried by the court; but (4) the court may, for its information, cause questions of fact to be tried by the jury; or (5) it may refer any such cause to a master for hearing and *report*, not for final determination.

Further upon the subject of trials it is provided (§ 560) that "upon trials of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant, unless one of the parties request it * * * in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly."

Under this legislation it is the court whose judgment is invoked that must finally decide. It may refer questions of fact to the jury, or the cause to a master, but, it cannot abdicate its power, nor confer upon another the absolute performance of any of its judicial
2485 functions. The master commissioner to whom a reference may be made is but an assistant of the court. He may be authorized to collect and analyze the evidence, state accounts, and other facts supposed to be proved, and may even express opinions on the law of the case, and do any other thing that goes to enlighten the court, or relieve it of the minor details of a suit, that does not supplant it in any of its rightful powers. This, however, its the limit of his authority.

In this case the master was commissioned to, and did report to the court the evidence, the facts supposed to be proven thereby, and the law that was supposed to govern such facts. This was all it was possible for him to do. The statute governing the reference conferred upon him power—not to hear and determine—but to hear and report his conclusions to the court, who by the same statute is required to try all issues of law, and issues of fact involved in the case. It necessarily follows that the master's report, in all its features, is advisory only. Lewis *v.* Godman, 129 Ind. 359; Bremmerman *v.* Jennings, 101 Ind. 253; McKinney *v.* Pierce, 5 Ind. 422.

The trial is before the court from beginning to end. The agency of the master commissioner is but a means of bringing the evidence before the court, as in some other cases it is brought by depositions and in others by the witnesses themselves, and as an aid to the court in the performance of its duties. The master's conclusions of law and of fact, are recommendations only, that the court will consider in the light of the accompanying evidence, and adopt as its own such as it approves, and reject such as it disapproves; and when the report has been fully considered and the exceptions thereto fully disposed of, and noted in writing, as in this case, there is no substantial difference in a record of facts and conclusions of law thus made, and in a special finding and conclusions of law made by the judge in the trial of an action at law where there is no request for a special finding under the statute. The record in both cases exhibits facts and conclusions of law that ultimately become those of the trial judge, and they must be held to be the same in legal effect. The signed writing, or record, of a trial judge containing the approved, and disapproved items of a master's report, and the conclusions of law stated in ruling upon exceptions thereto, is in every just sense a special finding, and when made without a request from one
2486 party or the other is a general finding only, and as specific findings and rulings can form no basis for appealable error.

It follows therefore that all errors assigned which challenge the action of the court in sustaining, or overruling, exceptions to the master's report, present no question for our determination; neither do said alleged errors for the reasons given, furnish any ground for a new trial.

7. Some additional questions are argued under the motion for a new trial.

During the civil war period the company paid to the National Government revenue taxes amounting in the aggregate to $117,137, and, counsel in their briefs have done "royal battle" over the question whether such taxes were paid as an excise on the earnings, and so, a charge against the corporation, or as a tax on the dividends declared, and so, a charge against the stockholders, the point being, that if the former position is true, the payments must be treated, in this accounting as operating expenses, and if the latter is correct they must be treated as dividends and considered in estimating the return of the capital invested. The question however becomes unimportant, in the view we have taken of the case.

As the finding of the court is general we are without information, or the means of information, as to the details, by which the court reached its final conclusion, and our only province, therefore, is to determine whether, from all the evidence, enough items sued for, are sustained, to equal the amount of the plaintiff's recovery, and if this is found in the affirmative, it can make no difference to the defendant through what process of reasoning the trial court reached the result obtained. Sheets *v.* Bray, 125 Ind. 33; Jacobs *v.* State, 127 Ind. 77; Stone *v.* United States, 164 U. S. 380, 383; Mining Co. *v.* Baker Co., 139 U. S. 222.

It will be recalled that the original franchise authorized the construction of a railroad from the western line of the State, through Terre Haute and Indianapolis to Richmond, the construction to be completed within fifteen years from the granting of the charter (1847); that the charter stipulated that the company should have the right to construct the road in such divisions, or parts, as its interests required, and upon the completion of any part, the
2487 rights and obligations imposed by the charter, should apply to any completed part in the same way, and to the same extent, as to the completed whole; that under this authority the road was completed and opened for business between Terre Haute and Indianapolis in 1851 and was a money maker from the beginning.

The undisputed evidence shows that in every year after 1852 to 1873 the corporation had a surplus of earnings after the payment of expenses and dividends, and such surplus in 1869 amounted to $1,049,365. From 1869 to 1871, both inclusive, the company expended for branches, sidings, equipment and an extension from Terre Haute to the Illinois State line, the sum of $863,855.—$448,959 of which was absorbed in the construction of the Illinois extension. The surplus referred to was at the time chiefly invested in profit bearing bonds and stocks, and the company doubtless deeming it more profitable to keep its securities, borrowed $800,000 by the

issue of bonds secured by mortgage on its property, and perhaps, used part, if not all the money in the execution of said several works.

Whatever may be said of the other expenditures of that period, it seems very clear for reasons given in a former part of this opinion, that the amount used in the extension to the Illinois State line cannot be treated as an operating expense, or as a part of the capital invested within the sense of § 23 of the charter.

The time limit for the building of the road expired in 1862, and the railroad had then been completed, and in successful operation, between Terre Haute and Indianapolis, for eleven years, and the construction account of the road had been formally closed on the books of the corporation (1856) for five years, without any step having been taken looking to the construction from Terre Haute to the Illinois State line, beyond procuring the right to do so in its original charter. Three years after the forfeiture of its right to build to the Illinois line (1865) the company, under the name of the Terre Haute and Indianapolis Railway Company, by a so-called amendment to its charter, procured from the legislature authority to make said extension.

The latter action of the legislature was neither an amendment, nor an extension of a former right, for there was then nothing to amend, or extend, but the authority given was the creation of a new right in every sense the same as if no such right had once existed under the old charter. The extension was not necessary to
2488 the successful conduct of the company's business. It was not a renewal, nor a needed improvement. It was simply an addition to the company's property. The right of the corporation to invest its surplus in proper channels will not be denied, but to employ its accumulated net earnings in the expansion of its property and assets, to the exclusion of the State cannot be conceded. Under the charter it was the duty of the directors to divide surplus profits as they arose, among the stockholders, as dividends, and if the duty had been performed, the day of reckoning with the State would have been hastened by several years, and it would be grossly inequitable to permit them to eliminate the rights of the State by withholding, and diverting such profits into other forms.

From the evidence, therefore, which is almost wholly undisputed, the account comes to this:

Total dividends declared to Dec. 31, 1871....	$3,601,212.	
Deduct total Government taxes.....	117,137.	
		$3,484,075.
Total capital invested.....	$1,216,690.	
Add ten per cent. per annum from several dates of investment to Dec. 31, 1871.....	2,074,281.	
		3,290,971.
Excess of dividends over capital and ten per cent.		193,104.

Add net earnings for 1870 and 1871 less amount of dividends declared for same years	138,552.
Add total net earnings for 1872	296,589.
Add unexpended surplus of Dec. 1869, being $1,049,365, less $863,855 expended in 1869, '70 and '71	185,510.
Plus amount expended in extension to Illinois	448,959.
	$1,262,714.
Deduct fifteen per cent. on capital invested ($1,216,690) from Dec. 31, 1871 to Jan. 17, 1873	190,503.
	$1,072,211.
Even deducting from contingent expenses 1873 as claimed	100,000.
And the balance apparently due the State is	$972,211.

To which might be added interest from date of demand.

It will thus be seen that excluding the Government taxes the finding and judgment against appellant might have been for a much larger sum, and was clearly within the evidence.

What has been said in former pages disposes of the seventh, eighth and ninth causes for a new trial.

8. The court did not err by referring the cause to the master. Field *v.* Brown, 146 Ind. 293.

The cross-errors assigned, and not waived, call in question the action of the trial court in overruling appellee's motions to modify the judgment. The trial court as we have seen made a general finding and rendered judgment thereon for the amount of
2489 the finding. There is nothing, therefore in the record showing that the motions to modify were not properly overruled.

Judgment affirmed.

Jordan, J., concurs in part and dissents in part.

2490 *Opinion Concerning and Dissenting in Part.*

JORDAN, *J.:*

I cannot unconditionally vote to affirm the judgment in this case and may state that it appears to me that the majority of the court has indulged in an unwarranted procedure in holding that the amount awarded to appellee by the judgment below should be affirmed, without regard to the Federal taxes, which the trial court, as is disclosed by its ruling on the exceptions, included as a part of the amount of recovery. If the amount of the Federal taxes in question be remitted, then the amount of the recovery remaining in my opinion will represent the extreme limit to which the State was legitimately entitled. This court seems to have reached the conclusion on the question in respect to the amount to be recovered, not by confining itself to a review of the rulings of the trial court

on the exceptions filed to the findings and conclusions of the
commissioner, on the point relative to what items should
cluded in constituting or making up the amount of recov
has wholly disregarded this question or issue as the same
sented and raised by the exceptions filed below, and dism
several exceptions and the rulings thereon as of no avail
senting any question for review in this case. Especially is t
or proposition disregarded, and not reviewed, which was det
adversely to appellant below, on the exception to the find
conclusion of the commissioner in regard to its being en
credit for the amount of the taxes which it paid to the Fede
ernment. I concede the right of the trial court to have set
rejected as a whole, the findings and conclusions of the mas
to make its own finding upon the evidence in respect to the
that ought to be recovered in this action. But this right, h
the trial court did not exercise. It is not disclosed that the
the evidence reported by the master made a general findin
out regard to its ruling on the exceptions upon this point,
evident that it decided the particular question on the spe
ception made to the report of the commissioner. Or in othe
the trial court when it sustained an exception to certain part
report of the commissioner thereby in effect substituted its
sion in the place of that stated by the master, and
denied an exception, by such ruling it in ef
2491 serted that it adhered to and approved the finding
clusion of the master commissioner. The exceptio
rulings thereon in respect to the recovery as presented a
treated as constituting a special finding and conclusions
court, and the parties have so considered them by basing
ments of error thereon. McCutcheon *v.* McCutcheon, 141 In
Under the rules pertaining to chancery practice the findi
conclusions of a master are considered as in the nature of a
finding and the right of the parties to present questions for
by means of exceptions thereto, is recognized. This practice
be said to be abrogated by the provisions of the civil code
ing to special findings. In fact it may be said that such pra
at least impliedly recognized by the provisions of the cod
which circuit and superior courts are empowered to appoint
ter commissioner to report the evidence, etc. The opinion
majority shows that this court rejects the question in regard
amount to be recovered as presented and raised by these sev
ceptions, and has virtually usurped the rights of the lower c
making its own finding upon the evidence, to sustain the
of the judgment, thereby considering not only the items wh
trial court allowed, but also those which it rejected and re
allow in favor of the State. In other words the opinion affir
it is wholly immaterial whether the lower court was right o
in declining to credit appellant with the Federal taxes in q
for the reason that there are other items which the trial c
disclosed by the rulings on the exceptions, refused to allow i

of appellee in assessing the amount of recovery, which when considered in this appeal, this court holds are more than sufficient to supply the deficiency which would result if the amount paid out by appellant as an excise tax was allowed to its credit. The conclusion apparently reached is that the action of the trial court in denying appellant the right to a credit for these taxes even though erroneous, must be deemed and treated as harmless. When the procedure or action of the court in finding, by the method employed, that the amount of recovery should be sustained, is considered, it is evident in my opinion that such procedure, under the circumstances, is wholly unwarranted by the rules of law governing the review of the question as herein involved and presented in relation
2492 to the proper amount of recovery. The exceptions and rulings thereon by the trial court certainly serve to expose or indicate in this appeal the views of the trial court in its application of the law in regard to what items ought to be and what ought not to be taken into consideration in assessing the amount which appellee is entitled to recover.

I concur with the majority of the court in its ultimate conclusion so far as it affirms appellee's right to recover in this action and would vote for an affirmance generally on the condition that the State be required to remit the amount as measured by the Federal taxes paid by appellant. That the latter is entitled to this credit I think is settled by the following decisions of the United States Supreme Court: Railroad Co. *v.* Collector's etc. 100 U. S. 595; United States *v.* Erie R. Co., 106 U. S. 327; Memphis etc. R. Co. *v.* United States, 108 U. S. 228.

These decisions construe the act of Congress under which the taxes were imposed, and by them the question arising on the construction of the Federal act in controversy, this court is bound, and it is not within its province to modify or overrule them.

2493 It is therefore considered by the court that the judgment of the court below in the above entitled cause, be in all things affirmed at the cost of the appellant.

And it is further considered and adjudged by the court that the appellees recover of the appellant, the sum of $— for their costs and charges in this behalf expended.

2494 STATE OF INDIANA, }
Supreme Court. }

I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of the proceedings had, papers filed (excepting briefs), motions decided, rulings made, opinions delivered, and judgments rendered in the said supreme court of Indiana, in a cause entitled, The Terre Haute and Indianapolis Railroad Company *vs.* The State of Indiana on the relation of William A. Ketcham,

attorney general, and numbered 19,728, as appears from the original papers on file in my office.

In witness whereof, I hereto set my hand, and affix the seal of said supreme court, at the city of Indianapolis, Indiana, this 21st day of March, A. D. 1903.

Seal Supreme Court, State of Indiana, MDCCCXVI.

ROB'T A. BROWN,
Clerk of Supreme Court of Indiana.

2495 Be it further remembered, that afterwards, towit, on the 20th day of April, 1903, the said The Terre Haute and Indianapolis Railroad Company, appellant filed in the supreme court of Indiana the writ of error issued by the Supreme Court of the United States, the entry of said filing being in these words and figures towit:

Comes now the Terre Haute and Indianapolis Railroad Company, the appellant in the cause entitled The Terre Haute and Indianapolis Railroad Company against the State of Indiana on the relation of William A. Ketcham, attorney general, No. 19728, and files the writ of error issued by the Supreme Court of the United States, which writ of error, is in these words and figures, towit:

2496 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Indiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Terre Haute and Indianapolis Railroad Company, appellant, and The State of Indiana *ex rel.* William A. Ketcham, attorney general, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
2496½ of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of April, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

April 16th, 1903.

[Endorsed:] Filed Apr. 20 1903. R. A. Brown clerk.

2497 And be it further remembered, that on the said 20" day of April, 1903, the said The Terre Haute and Indianapolis Railroad Company, appellant, filed in the supreme court of Indiana its appeal bond, the entry of said filing being in these words and figures, to wit:

"Now comes The Terre Haute and Indianapolis Railroad Company, the appellant in the cause entitled The Terre Haute and Indianapolis Railroad Company against The State of Indiana on the relation of William A. Ketcham, attorney general, No. 19728, and files its appeal bond in these words and figures, that is to say:

2498 Know all men by these presents, that we, the Terre Haute and Indianapolis Railroad Company, as principal, and the Union Trust Company of Pittsburgh, as sureties, are held and firmly bound unto the State of Indiana in the full and just sum of three thousand ($3,000) dollars, to be paid to the said State of Indiana or assigns: to which payment, well and truly to be made, we bind ourselves, and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of April, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a term of the supreme court of Indiana in a suit depending in said court, between The Terre Haute & Indianapolis Railroad Company as appellant, and The State of Indiana, appellee, a judgment was rendered against the said The Terre Haute & Indianapolis Railroad Company and the said company having

obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Indiana citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Terre Haute and Indianapolis Railroad Company shall prosecute said writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TERRE HAUTE & INDIANAPOLIS R. R. CO.
JAMES McCREA, *President.* [SEAL.]
Attest: W. G. PHELPS, *Ass't Secretary.* [SEAL.]
[SEAL.] THE UNION TRUST COMPANY OF PITTSBURGH,
By H. W. GUFFEY, [SEAL.]
Assistant to the President.
Attest: SCOTT RAY, *Secretary.*
[SEAL.]

Sealed and delivered in presence of—
——— ———.
——— ———.
——— ———.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

April 16th, 1903.

[Endorsed:] Filed Apr. 20, 1903. R. A. Brown, clerk.

2499 And be it further remembered, that on the said 20″ day of April, 1903, The Terre Haute and Indianapolis Railroad Company, the appellant in the cause entitled The Terre Haute and Indianapolis Railroad Company against The State of Indiana on the relation of William A. Ketcham, attorney general, No. 19,728, by its counsel files its assignment of errors, the entry of said filing being in these words and figures, to-wit:

Now comes the appellant by its counsel and files its assignment of errors in these words and figures, towit:

2500 Supreme Court of Indiana.

THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY, Appellant,
v.
THE STATE OF INDIANA *ex Rel.* WILLIAM A. KETCHAM, Attorney General, Appellee.

Assignment of Errors.

The Terre Haute & Indianapolis Railroad Company on the writ of error from the Supreme Court of the United States assigns as error:

1. That each of the following statutes of the State of Indiana is repugnant to section 10 of article 1 of the Constitution of the United States, and to article 5 and to section 1 of article fourteen of the amendments to said Constitution, to-wit:

The act approved January 27, 1897, p. 8. The act approved February 18, 1897, p. 38. The act approved February 24, 1897, p. 59. The act approved March 4, 1897, p. 145.

2. That the supreme court of Indiana erred—

a. In overruling the defendant's demurrer to the complaint, in so far as the demurrer is based upon the Constitution of the United States.

b. In sustaining plaintiff's demurrer to the second paragraph of the answer setting up a defense under the Constitution of the United States.

c. In sustaining the plaintiff's demurrer to the eleventh
2500½ paragraph of the answer setting up a defense under the Constitution of the United States.

d. In overruling the defense set up in the third paragraph of the answer setting up a defense under the Constitution of the United States.

e. In holding the defendant liable to the State of Indiana, notwithstanding the surrender of its charter in 1873, and the former judgment of the superior court of Marion county, Indiana, adjudging that the defendant was not liable to the State of Indiana.

f. In giving effect to the said acts of the legislature of Indiana passed in 1897, hereinbefore mentioned.

3. That the said acts of the legislature of Indiana and the judgment and proceedings in this case deprive the defendant of its property without due process of law, and denies to it the equal protection of the laws in contravention of the Constitution of the United States.

Said company therefore prays that the judgment of the supreme court of Indiana may be reversed.

JOHN G. WILLIAMS,
SAMUEL O. PICKENS,
LAWRENCE MAXWELL, JR.,
Counsel for the Terre Haute and Indianapolis Railroad Company.

[Endorsed:] Filed Apr. 20 1903 R. A. Brown, clerk.

2501 STATE OF INDIANA, }
Supreme Court. }

I, Robert A. Brown, clerk of the supreme court of the State of Indiana, hereby certify the above and foregoing to be a full, true and complete transcript of the record of the proceedings had, papers filed (except briefs) motions decided, ruling- made, opinions delivered, and judgments rendered in the said supreme court of Indiana in the cause entitled The Terre Haute and Indianapolis Railroad Company, appellant, against The State of Indiana on the relation of William A. Ketcham, attorney general, appellee, and numbered 19728, as appears from the records and original papers on file in my office.

I further certify that the writ of error inserted in said transcript is the original writ of error issued by the Supreme Court of the United States and filed in said cause.

In witness whereof I hereunto set my hand and affix the seal of said supreme court at the city of Indianapolis, Indiana, this 20″ day of April, 1903.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROB'T A. BROWN,
Clerk Supreme Court of Indiana.

2502 UNITED STATES OF AMERICA, ss:

To the State of Indiana *ex rel.* William A. Ketcham, attorney general, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Indiana wherein The Terre Haute and Indianapolis Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand nine hundred and three.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

2503 On this 20 day of April, in the year of our Lord one thousand nine hundred and three, personally appeared Alonzo Boyd before me, the subscriber, to me known personally to be a deputy marshall of the United States in and for the district of Indiana and makes oath that he delivered a true copy of the within citation to William A. Ketcham the relator named in the within citation, and to Winfield T. Durbin the governor of the State of Indiana and to Charles W. Miller the attorney general of the State of Indiana all on this the 20th day of April A. D. 1903.

ALONZO BOYD,
Deputy U. S. Marshal.

Sworn to and subscribed the 20 day of April, A. D. 1903.

[Seal District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk U. S. District Court, District of Indiana.

Marshal's costs $6.00.

2504 Supreme Court of the United States.

THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY, Plaintiff in Error,
vs.
THE STATE OF INDIANA.

Notice for the Purpose of Abridging the Printed Record under Rule 10, *Clause* 9.

The plaintiff in error considers the following portions of the record unnecessary for the consideration of the case on the errors which it has assigned, and it therefore proposes to omit the same in printing the record, to wit:

Bill of costs for serving summons, page 69.

The complaint filed May 28, 1875, in the case of The State of Indiana *ex rel.* The Attorney General *vs.* The Terre Haute & Indianapolis Railroad Company, pages 109 to 130 inclusive, being a repetition of Exhibit B. appearing at pages 41 to 63 inclusive.

Plaintiff's motion to strike out parts of eleventh paragraph of answer, pages 145 to 149 inclusive, and plaintiff's bill of exceptions to overruling of the motion, pages 151 to 155 inclusive.

Plaintiff's bill of exceptions No. 2 to overruling of motion to require defendant to paragraph eleventh paragraph of answer, page 157, from line 14, and page 158.

2505 Plaintiff's motion for inspection of books and papers, the order of the court thereon and defendant's bill of exceptions to said order, pages 161 to 177 inclusive.

Plaintiff's third bill of exceptions to overruling of motions to amend and modify decree, pages 260 to 271 line 17.

Application of Noble C. Butler, special master, for an allowance, motion for taxation of costs and order thereon, pages 276 to 279 inclusive.

Report of Noble C. Butler, special master, pages 283 to 338 line 13, being a repetition of his report as found at pages 186 to 231 inclusive.

Exhibit No. 3, being itemized construction account from May 1849, to June 30, 1852, pages 401 to 444 inclusive.

Exhibit No. 4, being itemized construction account from June 30, 1852, to December 31, 1852, page 448 to page 487 line 23.

Exhibit No. 5, being itemized construction account for year 1853, page 489 to page 522 line 2.

Exhibit No. 6, being itemized construction account for year 1854, page 523 to page 531 line 4.

Exhibit No. 7, being itemized construction account for year 1855, pages 532 to 537 inclusive.

2506 Exhibit No. 8, being itemized construction account for the years 1856 and 1864, pages 546 to 560 inclusive.

Exhibit No. 9, being consolidated construction account for the years 1849 to 1864, pages 569 to 578 inclusive.

Exhibit No. 10, being summarized construction account, page 581.

Exhibit No. 11, being itemized capital stock account, pages 583 to 614 inclusive.

Exhibit No. 12, statement of six per cent. bonds of 1850 and of seven per cent. bonds of 1851, pages 619 to 631 inclusive.

Exhibit No. 13, itemized discount account from 1849 to 1852, inclusive, pages 635 to 642 inclusive.

Exhibit No. 14, statement of transactions with Evansville & Crawfordsville R. R. Co. stock, pages 646 to 650 inclusive.

Exhibit No. 15, statement of Evansville & Crawfordsville R. R. Co. extension, pages 652 to 655 inclusive.

Exhibit No. 16, statement of loans to Indianapolis & Cincinnati R. R. Co., pages 657 to 659 inclusive.

2507 Exhibit No. 17, statement of transactions with Terre Haute, Alton & St. Louis R. R. Co., pages 661 to 668 inclusive.

Exhibit No. 18, statement of transactions in St. Louis, Vandalia & Terre Haute R. R. Co. loans, bonds and stock, and interest received thereon, pages 671 to 681 inclusive.

Exhibit No. 19, statement of Indianapolis & Madison R. R. Co. income bonds and preferred stock, pages 684 and 685.

Exhibit No. 20, statement of transactions of the company in its own stock and dividends received thereon, pages 693 to 704 inclusive.

Exhibit No. 21, statement of items showing concealment of assets and reduction of surplus, pages 713 to 731 inclusive.

Exhibit No. 22, itemized transportation account from beginning to 1854 inclusive, pages 744 to 778 inclusive.

Exhibit No. 23, itemized transportation account for 1855, pages 782 to 795 inclusive.

Exhibit No. 24, itemized transportation account for eleven months ending November 30, 1856, pages 800 to 825 inclusive.

Exhibit No. 25, itemized transportation account for year ending November 30, 1857, pages 829 to 855 inclusive.

2508 Exhibit No. 26, itemized transportation account for year ending November 30, 1858, pages 858 to 877 inclusive.

Exhibit No. 27, itemized transportation account for year ending November 30, 1859, pages 879 to 899 inclusive.

Exhibit No. 28, itemized transportation account for year ending November 30, 1860, pages 901 to 924 inclusive.

Exhibit No. 29, itemized transportation account for year ending November 30, 1861, pages 928 to 950 inclusive.

Exhibit No. 30, itemized transportation account for year ending November 30, 1862, pages 953 to 972 inclusive.

Exhibit No. 31, itemized transportation account for year ending November 30, 1863, pages 975 to 1003 inclusive.

Exhibit No. 32, itemized transportation account for year ending November 30, 1864, pages 1007 to 1030 inclusive.

Exhibit No. 33, itemized transportation account for year ending November 30, 1865, pages 1033 to 1057 inclusive.

Exhibit No. 34, itemized transportation account for year ending November 30, 1866, pages 1060 to 1085 inclusive.

2509 Exhibit No. 35, itemized transportation account for year ending November 30, 1867, pages 1088 to 1097 inclusive.

Exhibit No. 36, itemized transportation account for year ending November 30, 1868, pages 1100 to 1104 inclusive.

Exhibit No. 37, itemized transportation account for year ending November 30, 1869, pages 1107 to 1111 inclusive.

Exhibit No. 38, itemized transportation account for year ending November 30, 1870, pages 1114 to 1119 inclusive.

Exhibit No. 39, itemized transportation account for year ending November 30, 1871, pages 1122 to 1127 inclusive.

Exhibit No. 40, transportation account for year ending November 30, 1872, pages 1130 to 1134 inclusive.

Exhibit No. 41, statement of net earnings from December 1, 1872 to January 15, 1873, pages 1138 to 1143 line 13.

Exhibit No. 42, consolidated transportation earnings from beginning to November 30, 1872, pages 1180 to 1213 inclusive.

Exhibit No. 43, recapitulation of transportation earnings to November 30, 1872, summary and detail of additional expenditures and detail of operating expenses, pages 1215 and 1216.

2510 Exhibit No. 44, statement of cash and stock dividends, pages 1218 to 1259 inclusive.

Exhibit No. 45, itemized statement of earnings other than transportation, from interest, profit and loss and surplus accounts, 1849 to November 30, 1872, and consolidation thereof, pages 1264 to 1284 inclusive.

Exhibit No. 46, itemized interest account to November 30, 1872, pages 1286 to 1364 inclusive.

Exhibit No. 47, itemized surplus account to November 30, 1872, pages 1368 to 1391 inclusive.

Exhibit No. 48, itemized profit and loss account to November 30, 1872, pages 1394 to 1419 inclusive.

Exhibit No. 48 A, profit and loss account for year ending November 30 1873, pages 1420 to 1423 inclusive.

Exhibit No. 50, statement of expenditures, exclusive of operating expenses, interest and dividends, 1853 to 1872, pages 1443 to 1454 inclusive.

Exhibit No. 51, total net earnings to January 15, 1873, pages 1461 to 1464 inclusive.

Exhibit No. 52, account of foreign work and material sold, pages 1466 to 1469 inclusive.

2511 Exhibit No. 53, schedule of outside investments in loans, stocks and bonds, pages 1472 to 1479 inclusive.

Exhibit No. 55, statement of construction double track, equipment account, construction T. H. & I. R. R. extension, and railroad, cost of, account and Exhibit A. pages 1513 to 1525 inclusive.

Exhibit No. 57, mortgage of Terre Haute & Indianapolis Railroad Company to Farmers Loan & Trust Company, pages 1938 to 1950 inclusive.

Exhibit No. 62, transcript of the pleadings and proceedings in the *quo warranto* suit against the Terre Haute & Indianapolis Railroad Company in the Owen circuit court, pages 2189 to 2258 inclusive.

The complaint in case No. 10290, of The State of Indiana *ex rel.* The Attorney General *vs.* The Terre Haute & Indianapolis Railroad Company in the superior court of Marion county, page 2268, line 26, to page 2291 inclusive, being a repetition of Exhibit B. to the complaint in the present suit, appearing at pages 41 to 63 inclusive.

Plaintiff's exceptions to master's report, page 2389, line 17, to page 2434 inclusive, being a repetition of said exceptions as they appear at pages 339 to 382 inclusive.

LAWRENCE MAXWELL, JR.,
Counsel for Plaintiff in Error.

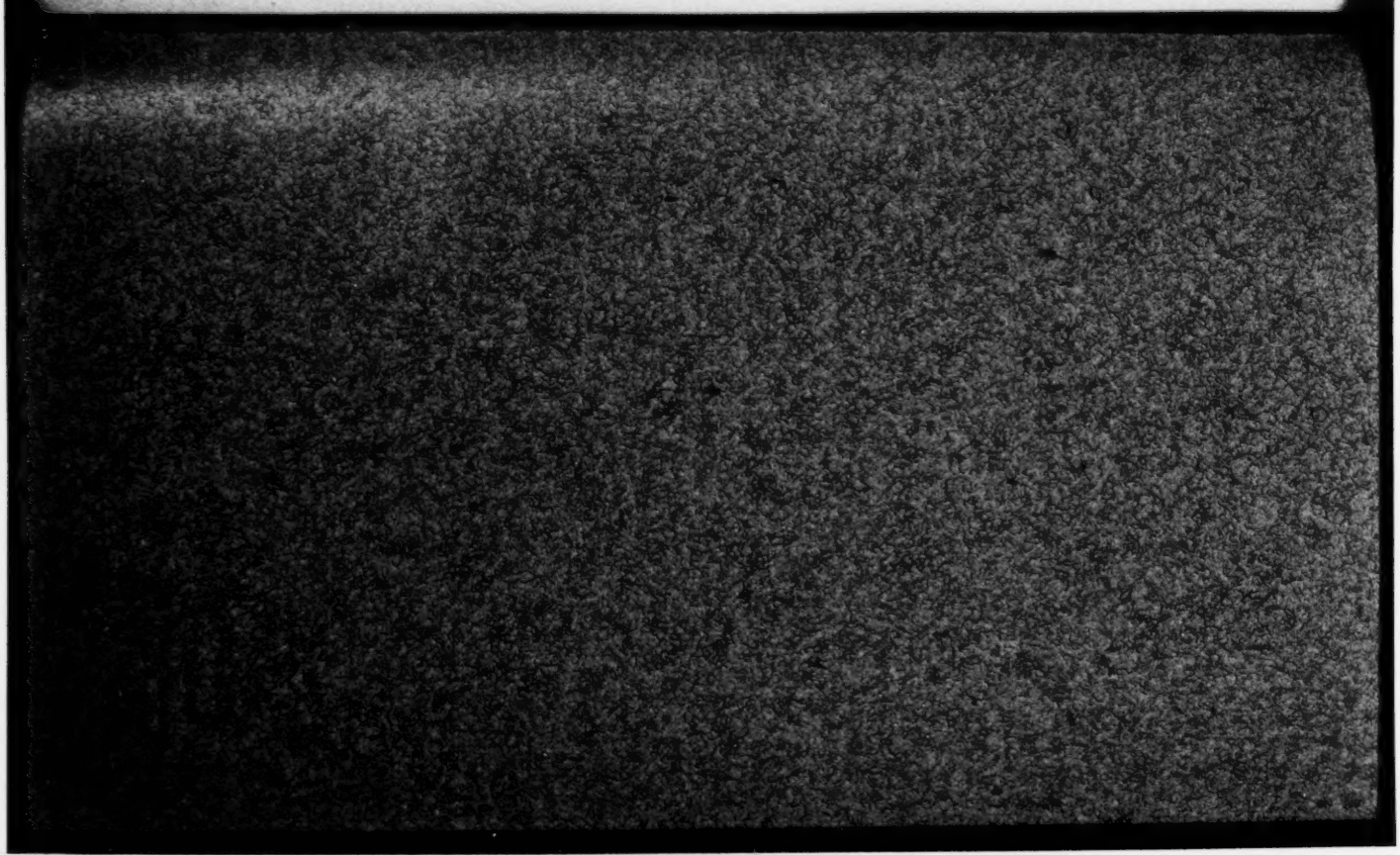
2512 Service of the foregoing notice accepted this 17th day of July, 1903.

WILLIAM A. KETCHAM,
Of Counsel for Defendant in Error.

2513 [Endorsed:] File No. 18,903. Supreme Court U. S. October term, 1903. Term No. 264. The Terre Haute and Indianapolis R. R. Co. P. E. *vs.* The State of Indiana. Designation by pl'ff in error of parts of record to be omitted in printing & proof of service of same. Filed July 20", 1903.

Endorsed on cover: File No. 18,903. Indiana supreme court. Term No. 264. The Terre Haute & Indianapolis Railroad Company, plaintiff in error, *vs.* The State of Indiana *ex rel.* William A. Ketcham, attorney general. Filed April 22d, 1903.

24503



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 264.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA ex rel. WILLIAM A. KETCHAM, Attorney General, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

This is a writ of error to revise a judgment of the Supreme Court of Indiana which affirmed a judgment of the Superior Court of Marion County, Indiana, in favor of the State of Indiana against the Terre Haute & Indianapolis Railroad Company for $913,905.01, on the ground that certain statutes of the State of Indiana passed in 1897, on which the suit is based and to which the judgment gives effect, are repugnant to the contract clause of the Constitution of the United States (section 10, article 1) and to the Fourteenth Amendment, and that property of the plaintiff in error has been taken without due process of law and that it has been denied the equal protection of the laws, in contravention of the Fourteenth Amendment.

The motion to dismiss or affirm is not based on the ground that the Railroad Company did not raise the federal questions on which it relies in due time and by proper pleadings in the Superior Court of Marion County, but on the ground that its claims of immunity under the federal constitution are not well founded, and that the State court properly overruled them. But that goes to the merits of the case, on which the Company desires to be heard in oral argument, and we therefore request that the motion be postponed to the merits. If the motion to dismiss or affirm had been made shortly after the case was docketed in this court, or after the record had been printed, other considerations might govern, but it has been delayed until the case is on the eve of being reached for argument. We feel at liberty therefore to confine ourselves now to a bare suggestion of the argument which we intend to develop at the hearing on the merits.

I.

The immunities claimed by the Company under the federal constitution were properly and specifically presented in the State court, first, by the demurrer to the complaint (Rec. 36) and, when that was overruled, by various defenses set up in the answer (Rec. 47, 50, 60), and were preserved by proper assignments in the Supreme Court of Indiana, and by an assignment of errors annexed to and returned with the writ of error issued by this court in compliance with Rev. Stat. U. S. sec. 997. Rec. 687. The demurrer challenged the complaint on the ground that "it seeks to take from this defendant property in which it has vested rights by virtue of its original charter and the amendments thereof, and by virtue of the judgment of this honorable court in the complaint set forth, and to accomplish this result invokes the aid of laws enacted by the General Assembly of the State of Indiana at its regular session in 1897, which said laws and all the acts and doings of the plaintiff in attempting to deprive defendant of its property and to invalidate said judgment are in violation of section 10 of article 1 of the Constitu-

tion of the United States, and of article 5, and section 1 of article 14 of the amendments to said Constitution." Rec. 36. The answer, at the several pages pointed out, challenged the validity of the Acts of 1897 and of the State's proceedings thereunder, in the same terms.

II.

The charter granted to the Company by the State of Indiana, January 26, 1847, gave the corporation the right to "charge and receive such tolls and freights * * * as shall be for the interest of said company, and to change, lower, or raise at pleasure" (sec. 22), and to make "semi-annual dividends of so much of the profits as the corporation may deem expedient," and to "retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper" (sec. 24). Rec. 20. The present suit is based on section 23 of the Act which reads as follows (Rec. 20):

"That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same."

The legislature never regulated the tolls and freights and never required the company to furnish a statement of its expenditures, expenses or profits.

On January 17, 1873, the Company duly surrendered its charter in pursuance of sec. 36 of the general railroad law of the State passed May 11, 1852, to-wit:

"Sec. 36. Any existing railroad company may acquire all of the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company. *The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized*; and, thereupon, said company shall possess such powers so accepted and be subject to the obligations and restrictions herein specified as fully as it would have had and been if organized under this act."

On May 28, 1875, the State commenced an action against the Railroad Company in the Superior Court of Marion County to recover the same moneys claimed to be due to the State in the present suit, under sec. 23 of its charter. Rec. 22. The suit was brought in pursuance of a written agreement between the Company and the State, executed by Governor Hendricks, the Lieutenant Governor and the Attorney General under a joint resolution of the General Assembly, which provided that the State should institute an action "in the Superior Court of Marion county for the recovery of any money which may be due the State or the school fund of the State, under and by virtue of said companies' charter of January 26th, 1847, and the amendments thereto." The Company agreed to enter its appearance and stipulated "that if in making up the issues and on the trial of said cause it can be shown under the law, and the evidence that is adduced, that any money is due to the State or school fund of the State from said old company or companies (by whatsoever name or names) under and by virtue of said charter and amendments thereto and the law and facts applied thereto, then and in that case, the company as now organized shall pay such amount and judgment shall be rendered in said action for money, for the sum that may be found due." Rec. 48, 49.

The Company appeared and demurred to the State's complaint, which was identical with the complaint in the present suit, except the references in the latter to the unconstitutional legislation of 1897. The court sustained the demurrer and on May 9, 1876 dismissed the action on the ground that section 23

of the charter did not require the Company to account to the State for surplus profits in the absence of legislation regulating its tolls. (See the opinion of the court filed on sustaining the demurrer, Rec. 607). The State appealed to the Supreme Court of Indiana, where the judgment was affirmed in 1878 on the ground of irregularity and insufficiency of the record, without passing upon the merits. State vs. Terre Haute & Indianapolis R. R. Co. 64 Ind. 297.

It was supposed that the surrender of the Company's charter in 1873, followed by the foregoing judgment in its favor in 1876, affirmed by the Supreme Court of Indiana in 1878, put at rest the claim that the Company was liable to the State under section 23 of its charter. That view seems to have been acquiesced in for twenty years or more until 1897, when the legislature passed four statutes, which, for flagrant violation of constitutional guaranties, are without a parallel in the history of legislation. They are set forth at pages 9, 12, 15 and 17 of the State's brief on its motion to dismiss or affirm. By the first of these acts passed January 27, 1897, the legislature, notwithstanding the surrender of the Company's charter and the prior adjudication in its favor, recited that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section," and ordered the Company to file a statement of its receipts, expenditures, profits and the disposition thereof from January 26, 1847, to January 17, 1873, inclusive.

The second act passed February 18, 1897, undertook to amend the statute under which the Company had surrendered its charter, twenty-four years before, by providing that "whenever any railroad company * * * shall have heretofore accepted the provisions of the general railroad law, * * * all rights and liabilities, whether inchoate or complete, in favor of the State of Indiana, shall be, and they are hereby, expressly reserved to said State, *notwithstanding said acceptance* and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the General

Assembly may deem appropriate and *notwithstanding such acceptance* any and all provisions of said charter may be amended, revised, repealed or *added to* as *though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May 11, 1852.*"

The third act, passed February 24, 1897, undertook to revive and amend section 23 of the Company's charter, which had been dead and surrendered for twenty-four years, by imposing obligations not found in the original section and by declaring that the right of the State "shall be the same as though this amendment had been originally a part of the charter of said railroad, and, as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law."

Having thus declared ex post facto that the Company's surrender of its charter made in 1873 was inoperative, and having revived and amended the surrendered charter to suit itself, the legislature proceeded by the fourth and last act of the series to deal with the surplus profits of the Company, earned between 1847 and 1873, in excess of a certain sum, by saying that "the same are *hereby declared to be due and payable to the treasurer of state for the use of common schools and are hereby appropriated to that purpose.*" (sec. 1), and the Attorney General was directed to sue for their recovery. The present suit was brought for that purpose.

III.

Counsel do not deny that the Supreme Court of Indiana has given *some* effect to the unconstitutional legislation of 1897. Their claim is that the court has treated it only as providing a remedy for obligations otherwise existing, and, that, so regarded and to that extent, it is not repugnant to the Federal Constitution. It is true that the Court says in its opinion "that the respective rights and liabilities of the parties must now be determined by the contractual relations entered into in 1847 in the same way as if the legislation of 1897 had never been en-

acted," and that the legislation of 1897 may be considered out of the case "except as conferring certain powers upon the Attorney General and as defining the procedure whereby the claims asserted by the State as arising under the original charter, may be fully and fairly contested with appellant." Rec. 655. But the grounds of the decision as well as the judgment itself, show that the real effect given to the statutes of 1897 by the Supreme Court of Indiana is to *create* obligations which do not otherwise exist, in derogation of the contract between the Company and the State involved in the surrender of its charter in 1873, and the unqualified acceptance of such surrender by the State.

In inquiring whether the legislation of 1897 impairs the contract of 1873, this court will determine for itself the effect of the company's surrender of its charter, so as to see whether any obligation to the State thereunder survived the surrender. If not, none can be lawfully imposed by the legislation of 1897, on the pretense that it provides only a remedy. "There is no doubt of the general proposition that, where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon the contract, though it may differ from that of the Supreme Court of the State." 180 U. S. 44. "When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and, also, all of that which is claimed to have taken it away." 192 U.S. 85.

The opinion of the Supreme Court of Indiana in other parts contradicts the theory that the legislation of 1897 provides only a remedy, for it holds that the judgment of 1876 in favor of the Company is not a bar to the present suit for the reason that *no cause of action* existed in 1875 in favor of the State. The court says "No duty rested upon the corporation to pay any sum to the treasurer of State, and *no right of action rested in the State for the recovery of money, with or without demand.* The duty to account when required, as imposed by section 23, means nothing more or less than the duty to settle, and pay over to the treasurer of State any surplus disclosed when requested or

demanded by the legislature to do so. * * * We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the general assembly. This request was not made until 1897, *and no actionable default by appellant had occurred prior to that date.*" Rec. 668, 669.

Again,

"When the Attorney General commenced the suit of 1875 *the State had no right of action* against appellant." Rec. 672.

And in refusing to give effect to the judgment in that action, on the ground that it was not an adjudication on the merits, the court says:

"There can be no merits where there exists no cause of action." Rec. 672.

But if the State had no cause of action in 1875, which was two years after the Company had surrendered its charter unconditionally and without reservation; if nothing was due to the State at that time, because no default on the part of the Company had then occurred, the effect necessarily given, by the judgment under review, to the legislation of 1897 is not merely to provide a remedy, but to impose an obligation and create a right.

The effect of the surrender of the charter in 1873 involves an inquiry into the extent of the obligation imposed by the surrendered charter. That inquiry this court will make for itself, and, if it holds, as we contend, that section 23 of the charter of 1847 imposed no obligation on the Company to account for surplus profits in the absence of legislation regulating tolls, no such obligation survived the surrender of the charter in 1873. "The judgment rests upon the construction of the original charter, that is, upon the contract between the State and the bank, but to construe that is also our function * * * When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and also all of that which

is claimed to have taken it away. We are certainly not confined to the decision under review. To hold that, would surrender the power of review." 192 U. S. 73, 77, 85.

The effect of the surrender of the charter in 1873 is disposed of by the Supreme Court of Indiana in three lines, with the statement that "the acceptance in 1873 of the general railroad law of 1852 had no effect in relieving the appellant from unperformed duties, assumed in its charter contract of 1847." Rec. 673, 674. But this court will construe the charter of 1847 and the contract of surrender of 1873, for itself, in order to determine whether the effect which the Supreme Court of Indiana has given to the legislation of 1897 impairs the obligation of the contracts between the Company and the State, or destroys the vested rights of the Company.

IV.

The Supreme Court of Indiana has treated the legislation of 1897 not only as giving rise to an obligation which would not exist but for that legislation, but has fixed the measure of the Company's liability to the State by provisions found only in the acts of 1897, and not in section 23 of the original charter. The judgment, for instance, holds the Company liable for the net earnings from December 31, 1869, to January 17, 1873, and for the surplus profits remaining since December 31, 1869, deducting therefrom only 15 per cent. on the sum invested, as computed by the court, from January 1, 1870, to January 17, 1873. Rec. 103. No such basis of liability can be found, except in the legislation of 1897.

V.

The judgment treats the tax on dividends paid by the Company to the United States as part of the "dividends declared." Rec. 98. This is an erroneous construction of the Federal Statute, which regards the tax as a debt due from the Company. Railroad Co. vs. Collector, 100 U. S. 595; United States vs. Erie Railway Co. 106 U. S. 327; Bailey vs. Railroad Co. 106 U. S. 109; Memphis, etc., R. R. Co. vs. United States, 108 U. S. 228.

VI.

We recognize the rule that the failure of the court of a State to give effect to a prior judgment of a court of the same State, does not ordinarily present a federal question; but where, after the surrender of a charter, it has been adjudicated between the State and the Company that the Company is not liable to the State under that charter, and in the face of such surrender and adjudication, the State passes, and its courts enforce, legislation providing for a new suit on behalf of the State, and the courts of the State decline to give effect to the prior adjudication, we have a case in which property of the Company has been taken by the State without due process of law, through the instrumentality of its legislative, executive and judicial departments, acting jointly and severally. The provisions of the Fourteenth Amendment refer to all the instrumentalities of the State, including its legislative, executive and judicial authorities. C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226.

There is no color for the motion to dismiss, and in view of the importance of the questions, the amount involved, and the late day at which the motion to dismiss or affirm is presented, we respectfully submit that it should be postponed to the hearing on the merits.

LAWRENCE MAXWELL, Jr.,
SAMUEL O. PICKENS,
JOHN G. WILLIAMS,
Counsel for the Plaintiff in Error.

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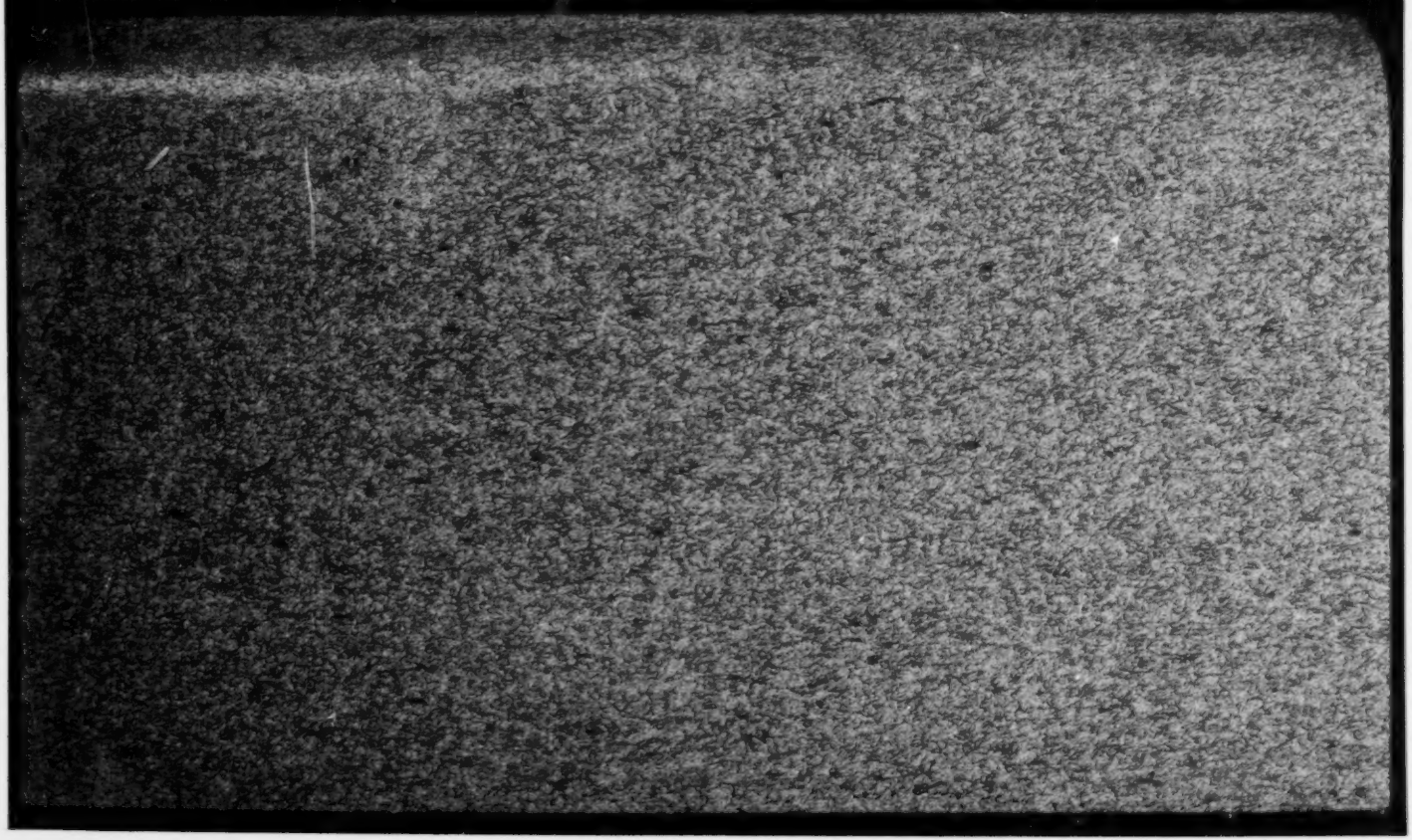

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 264.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA ex rel. WILLIAM A. KETCHAM, Attorney General, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to revise a judgment of the Supreme Court of Indiana which affirmed a judgment of the Superior Court of Marion County, Indiana, in favor of the State of Indiana against the Terre Haute & Indianapolis Railroad Company for $913,905.01, on the ground that certain statutes of the State of Indiana passed in 1897, on which the suit is based and to which the judgment gives effect, are repugnant to the contract clause of the Constitution of the United States (section 10, article 1) and to the Fourteenth Amendment, and that property of the plaintiff in error has been taken without due process of

law and that it has been denied the equal protection of the laws, in contravention of the Fourteenth Amendment.

The plaintiff in error was incorporated under the name of the Terre Haute and Richmond Railroad Company by an act of the general assembly of Indiana, approved January 26, 1847, for the purpose of building a railroad from a point on the western line of the State of Indiana, eastwardly through Terre Haute, Greencastle and Indianapolis to Richmond, Indiana. The charter is annexed to the complaint as Exhibit A., and is printed in full at pages 15 to 22 of the record. It gave the corporation the right to "charge and receive such tolls and freights * * * as shall be for the interest of said company, and to change, lower, or raise at pleasure" (sec. 22), and to make "semi-annual dividends of so much of the profits as the corporation may deem expedient," and to "retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper" (sec. 24). Rec. 20. The present suit involves the construction of section 23 which reads as follows (Rec. 20):

"Section 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same."

The legislature never regulated the tolls and freights, and never required the company to furnish a statement of its expenditures, expenses or profits.

On January 17, 1873, the company duly surrendered its char-

ter in pursuance of sec. 36 of the general railroad law of the State passed May 11, 1852, to-wit:

"Sec. 36. Any existing railroad company may acquire all of the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company. *The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized*; and, thereupon, said company shall possess such powers so accepted and be subject to the obligations and restrictions herein specified as fully as it would have had and been if organized under this act."

On May 28, 1875, the State commenced an action against the company in the Superior Court of Marion County to recover the moneys claimed to be due to the State in the present suit. Rec. 22. The suit was brought in pursuance of a written agreement between the company and the State, executed by Governor Hendricks, the lieutenant governor and the attorney general, under a joint resolution of the General Assembly, approved March 10, 1873. Rec. 624. The written agreement, which is dated October 5, 1874, provided that the State should institute an action "in the Superior Court of Marion county for the recovery of any money which may be due the State or the school fund of the State, under and by virtue of said companies' charter of January 26th, 1847, and the amendments thereto." The company agreed to enter its appearance and stipulated "that if in making up the issues and on the trial of said cause it can be shown under the law, and the evidence that is adduced, that any money is due to the State or school fund of the State from said old company or companies (by whatsoever name or names) under and by virtue of said charter and amendments thereto and the law and facts applied thereto, then and in that case, the company as now organized shall pay such amount and judgment shall be rendered in said action for money, for the sum that may be found due." Rec. 620.

The company appeared and demurred to the State's complaint, which was substantially identical with the complaint in

the present suit, except the references in the latter to the unconstitutional legislation of 1897, and to the former suit. The court sustained the demurrer and on May 9, 1876, rendered judgment for the defendant, on the ground that section 23 of the charter did not require the company to account to the State for surplus profits in the absence of legislation regulating its tolls. The opinion of the court filed on sustaining the demurrer, after a careful analysis of different sections of the charter, says:

"In view, therefore, of the construction placed upon the different sections, we conclude that the State can not call upon the defendant to pay surplus earnings over to the State as a part of the school funds without having previously legislated by regulating the amounts of tolls and freights. * * * This must be a correct view of the question, for the terms of the twenty-third section do not limit the amount of dividends that may be made under the extremely liberal provisions of the twenty-second and twenty-fourth sections, until such time as the legislature may regulate the tolls and freights, and the regulation of the tolls and freights by the legislature operates to limit the amount of earnings to be thereafter divided. The stockholders are not, without further legislation, prohibited from receiving any amount of dividends either annually or in the aggregate amount, nor the company prohibited from regulating tolls and freights so that they may be able to make larger dividends. It follows from this that the stockholders have a vested right in the earnings and accumulations already made by reason of the State having failed to act under the provisions reserved by the terms of the charter." Rec. 616, 617.

The State appealed to the General Term of the Superior Court, which on May 27, 1876, affirmed the judgment for the defendant, and thence to the Supreme Court of Indiana, where the judgment was affirmed in 1878 on the ground of irregularity and insufficiency of the record, without passing upon the merits. State vs. Terre Haute & Indianapolis R. R. Co. 64 Ind. 297.

The making of the agreement of October 5, 1874, was duly reported by the attorney general to the governor, in an official report dated November 6, 1874, which sets forth the agreement between the State and the company in haec verba. The report and agreement were submitted by the governor to the general

assembly at its session of 1875, before the suit for which the agreement provided was instituted. Rec. 619. On November 7, 1876, the attorney general made the following report to the governor. Rec. 623:

"The Terre Haute and Indianapolis Railroad Company.

My immediate predecessor in office, Hon. J. C. Denny in his report of November 6th, 1874, gives the history of this case to that date. Since then a civil action was brought on behalf of the State on relation of the attorney general against the company in the superior court of Marion county, demanding judgment in round numbers for a million and a half dollars. After full argument before the full bench of three judges of said court and presentation of printed briefs, the court decided against the State, mainly upon the ground that, under the provisions of the special charter to the company, legislation regulating the tolls and freights of the company was a pre-requisite to any recovery for the State. No such legislation has ever been had and an appeal was taken to the supreme court, where it is now pending."

Clarence A. Buskirk.

Dated November 7, 1876.

It was supposed that the surrender of the company's charter in 1873, followed by the foregoing judgment in its favor in 1876, affirmed by the Supreme Court of Indiana in 1878, put at rest the claim that the company was liable to the State under section 23 of its charter. That view seems to have been acquiesced in for twenty years or more until 1897, when the legislature passed four statutes, which, for flagrant violation of constitutional guaranties, are without a parallel in the history of legislation. They are printed in full as an appendix to this brief. By the first of these acts passed January 27, 1897, the legislature, notwithstanding the surrender of the company's charter and the prior adjudication in its favor, recited that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section," and ordered the company to file a statement of its receipts, expenditures, profits and the disposition thereof from January 26, 1847, to January 17, 1873, inclusive.

The second act passed February 18, 1897, undertook to amend

the statute under which the company had surrendered its charter, twenty-four years before, by providing that "whenever any railroad company * * * shall have heretofore accepted the provisions of the general railroad law, * * * all rights and liabilities, whether inchoate or complete, in favor of the State of Indiana, shall be, and they are hereby, expressly reserved to said State, *notwithstanding said acceptance*, and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the general assembly may deem appropriate, and *notwithstanding such acceptance* any and all provisions of said charter may be amended, revised, repealed or *added to as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May* 11, 1852."

The third act, passed February 24, 1897, undertook to revive and amend section 23 of the company's charter, which had been surrendered twenty-four years before, by imposing obligations not found in the original section and by declaring that the right of the State "shall be the same as though this amendment had been originally a part of the charter of said railroad, and, as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law."

Having thus declared ex post facto that the company's surrender of its charter made in 1873 was inoperative, and having revived and amended the surrendered charter to suit itself, the legislature proceeded, by the fourth and last act of the series, to deal with the surplus profits of the company, earned between 1847 and 1873, in excess of a certain sum, by saying that "the same are *hereby declared to be due and payable to the treasurer of state for the use of common schools and are hereby appropriated to that purpose*" (sec. 1), and the attorney general was directed to sue for their recovery. The present suit was brought for that purpose.

The complaint sets forth the charter of 1847, which is made an exhibit, the surrender thereof by the company on January 17, 1873, the judgment of 1876 in favor of the company, and the

legislation of 1897. It concludes its recital of the legislation of 1897 with the following allegation:

"And thereupon afterwards said general assembly did, by an act approved on the 4th day of March, 1897, appropriate for the use of common schools the net earnings of said defendant, after dividends amounting to fifteen per centum per annum from and after the time when the earnings of said road had amounted to an amount sufficient to repay the cost of construction, with interest thereon at the rate of ten per centum; and it also required that the said defendant company should account to the relator herein for the use of the common schools of the State of Indiana for such net earnings so in excess of said dividends of fifteen per centum, and did authorize and require of the relator herein to demand and enforce such accounting by proper proceedings in court, and thereupon afterwards, to-wit; on the 13th day of March, 1897, the plaintiff by its attorney general, being thereunto duly authorized and empowered, did demand of the defendant company an accounting of said net receipts so in excess of said fifteen per centum from and after the time when the cost of construction with ten per centum thereon had been earned, and did demand that the same should be paid over to said attorney general for the use and benefit of the common schools; but so to do the defendant wholly failed, neglected and refused.

Plaintiff further charges that if the account were properly taken a large balance, to-wit, a balance in excess of $3,000,000, would be due and owing to the plaintiff for the use of its common schools." Rec. 14.

The prayer is for an accounting and "that in taking said account it may be ascertained what was the true cost of the construction of said railroad, and at what time the net earnings of said railroad had equaled such cost of construction, together with interest thereon at the rate of ten per centum per annum, and what amount from and after that time there was of the net earnings of said road in excess of fifteen per centum upon the cost of such construction." Rec. 15.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and, in support of the demurrer, insisted that the complaint "seeks to take from this defendant property in which it has

vested rights by virtue of its original charter and the amendments thereof, and by virtue of the judgment of this honorable court in the complaint set forth, and to accomplish this result invokes the aid of laws enacted by the general assembly of the State of Indiana at its regular session in 1897, which said laws and all the acts and doings of the plaintiff in attempting to deprive defendant of its property and to invalidate said judgment are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5, and of section 1 of article 14 of the amendments to said Constitution." Rec. 36.

The court overruled the demurrer. Rec. 37. The defendant filed an answer in eleven paragraphs. Rec. 45, 56, 58. The first was a general denial. The second, third and eleventh paragraphs set up defenses under the Constitution of the United States. The court sustained a demurrer to the second and eleventh (Rec. 58, 63) paragraphs, and at the trial overruled the defense under the Constitution of the United States, set up in the third paragraph. We print here the three paragraphs of the answer which raise federal questions.

"Paragraph 2. Defendant, further answering, says that after it became incorporated under the act of the general assembly of the state of Indiana, approved January 26, 1847, and before any part of the railroad authorized by that act had been completed or put in operation, this defendant solicited the passage of an act by said general assembly, amending its original charter of 1847, and thereupon said general assembly passed an act entitled, 'An Act to amend the act entitled an act to incorporate the Terre Haute and Richmond Railroad Company, approved January 26, 1847, and the several acts amendatory of said act,' approved January 20, 1851. And this last named act was immediately upon its passage and approval, accepted and adopted by defendant; that pursuant to the terms of said act of 1851, the railroad of defendant was terminated at Indianapolis, Indiana, instead of Richmond, Indiana, and has so remained ever since; that in the year 1852 defendant commenced to operate, between Indianapolis and Terre Haute, Indiana, that portion of the railroad which it was authorized to build and operate, but did not construct nor put in operation that portion of its road between Terre Haute and the eastern boundary line of the

state of Illinois until the year 1870, and since said last named year it has owned and operated only that portion of the railroad authorized by its charter of 1847 which lies between Indianapolis and said Illinois line, and has never at any time owned nor operated a railroad between said Illinois line and Richmond, Indiana.

"Defendant says that notwithstanding these facts, which at the time of the passage of the several acts hereinafter named, were, and for many years prior thereto had been well known to the plaintiff and the relator herein, and notwithstanding the further fact that defendant, on the 17th day of January, 1873, filed in the office of the secretary of state of Indiana an acceptance by it of an act entitled, 'An Act to provide for the incorporation of railroad companies,' approved May 11, 1852, the general assembly of the state of Indiana, at its regular session in 1897, at the suggestion and under the advice of the relator herein, passed, and the governor of said state approved, the following acts, to which reference is made in the complaint herein, to-wit: The act of January 27, 1897, declaring that a large amount of money is due to the state of Indiana for the use of the common schools, under section 23 of the original charter, and requiring defendant to furnish a statement of its expenditures, receipts and profits; the act of February 18, 1897, amending section 36 of the general railroad law of May 11, 1852, so as to provide that the acceptance by defendant of said railroad law should not operate as a surrender of its original charter and the acts amendatory thereof; the act of February 24, 1897, amending section 23 of defendant's original charter so as to diminish the rights and largely increase the obligations of the defendant to the state of Indiana, as such rights and obligations existed under sections 22, 23 and 24 of defendant's original charter; the act of March 4, 1897, appropriating for the use of the common schools of the state of Indiana certain alleged surplus profits arising from the operation of defendant's road, and directing the collection, by the relator herein, of said profits.

"Defendant says that at the time it accepted, as aforesaid, the general railroad law of 1852, it was not indebted in any way to the state of Indiana for any of the profits made by it in the operation of the railroad owned and operated by it as aforesaid, nor was it then nor is it now indebted to said state of Indiana, nor to the treasurer of said state, nor to the common schools thereof, in any sum whatever, and these facts were well known to the plaintiff and the relator herein when the several acts here-

inbefore mentioned were passed by the general assembly of the state of Indiana at the regular session thereof in 1897, and by the passage of said last named acts, and by the prosecution of this action against the defendant, the state of Indiana, plaintiff herein, and the relator, the attorney general thereof, were and are seeking to take this defendant's property for public use, without just compensation, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired under the provisions of its original charter and the acts amendatory thereof, and to deprive this defendant of its property and the enjoyment thereof, without due process of law, all of which acts and doings defendant says are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5 and of section 1 of article 14 of the amendments to said constitution." Rec. 45.

The court sustained a demurrer to the foregoing defense. Rec. 58.

"Paragraph 3. Defendant, further answering, says: That some time prior to 1873 the state of Indiana, plaintiff herein, on the relation of the prosecuting attorney of Putnam county, Indiana, filed an information against this defendant in the circuit court in and for the said county of Putnam, seeking a forfeiture of the charter granted defendant by the act of the general assembly of the state of Indiana, approved January 26, 1847, and the acts amendatory thereof, because of certain alleged acts and doings of the defendant set forth in said information, which acts and doings so set forth are identical with the acts and doings set forth in the complaint herein, and upon which plaintiff now bases the right of recovery herein; that said action was taken on change of venue to the circuit court in and for the county of Owen and state of Indiana, and a trial thereof in said last named court resulted in a disagreement of the jury; that subsequent to such trial and whilst said action was still pending in said Owen circuit court an agreement was made and entered into between the plaintiff herein, the state of Indiana, and this defendant, under and pursuant to joint resolution No. 16, adopted by the general assembly of the state of Indiana, entitled, 'A joint resolution in relation to railroad companies and corporations, and defining the duties and giving directions to the attorney general as to suits and proceedings now pending and which may hereafter be brought,' approved March 10, 1873, which agreement was in the words and figures following, to-wit:

"The State of Indiana, ex rel. John C. Robinson, Prosecuting Attorney, etc., vs. The Terre Haute and Indianapolis Railroad Company, in the Owen circuit court, October term, 1874.

"The parties to the above cause make the following agreement:

"The defendant agrees, by her attorneys and officers, to at any time enter the appearance of the defendant to an action to be instituted by the plaintiff (the state of Indiana), in the superior court of Marion county, for the recovery of any money which may be due the state or the school fund of the state, under and by virtue of the said company's charter of January 26, 1847, and the amendments thereto. In consideration of which said agreement, the plaintiff, by her attorneys and proper officers agrees to suspend further prosecution of said action now pending in the Owen circuit court until the final determination of such action so as aforesaid to be instituted for the recovery of money; and if in said last named action the defendant shall prevail, then the said plaintiff agrees to dismiss said suit in the said Owen circuit court, and if the said plaintiff in the said action to be instituted for money shall prevail, the said action in the Owen circuit court shall be dismissed only when the defendant shall have satisfied the judgment so obtained in the latter action for money; but nothing herein shall be so construed as to compel the dismissal of said suit in the Owen circuit court until said action so to be instituted shall have been finally tried upon the issues joined between the parties, or it shall be found in framing the issues, and determined by the court, that no right of action exists in favor of the state or the school fund. And it is further agreed that the agreed statement, which was prepared to be and which was in part used in the trial of said cause in the Owen circuit court, may be used as evidence without objection so far as the same may be competent, in the suit to be brought by the state against said company.

"It is further agreed that either party may withdraw the depositions on file in the Owen circuit court in said cause, and may read the same, so far as the same in their subject-matter may be found competent. And that this may be done notwithstanding any order of the Owen circuit court suppressing the same: Provided, The party so using any such depositions shall cause the same to be filed in the court where the case may be pending twenty days before the day for which said cause is set for trial; but this agreement shall not be construed to prevent either

party from taking additional depositions of the same or other witnesses.

"And it is agreed that if in making up the issues and on the trial of said cause it can be shown under the law, and the evidence that is adduced, that any money is due to the state or school fund of the state from said old company or companies (by whatsoever name or names), under and by virtue of said charter and amendments thereto and the law and facts as applied thereto, then, and in that case, the company as now organized shall pay such amount, and judgment shall be rendered in said action for money, for the sum that may be found due.

"Nothing herein contained shall be construed to prevent the defendant from setting up any defense which existed in behalf of said old company prior to the surrender of said old charter.

"Indianapolis, October 5, 1874.

"J. C. Denny,
"Attorney General, Indiana.
"The Terre Haute and Indianapolis Railroad Company,
"By W. R. McKeen, President.
"R. W. Thompson,
"C. F. McNutt,
"Thos. R. Cobb,
"Attorneys for T. H. & I. R. R. Co.

"This agreement made by the attorney general (with the concurrence of his associate counsel, as we understand) we approve.

"October 5, 1874.

"Thomas A. Hendricks, Governor.
"Leonidas Sexton, Lieut. Governor."

"Defendant says that prior to the execution of this agreement, to-wit, on January 17, 1873, it had filed in the office of the secretary of state of the state of Indiana its acceptance of an act of the general assembly of said state, approved May 11, 1852, and entitled 'An Act to provide for the incorporation of railroad companies,' and ever since the filing of said acceptance this defendant has been and still is existing and acting as a corporation under the general laws of the state of Indiana concerning railroad companies.

Defendant says that at the time the agreement hereinbefore

set forth was executed, and during all the period that elapsed between the institution of said suit in the Putnam circuit court and the execution of said agreement, the state of Indiana, plaintiff herein, was claiming that under the provisions of the charter of January 26, 1847, this defendant was required to pay to the treasurer of state, for the use of the common schools of said state of Indiana, a portion of its surplus profits, and that there was a large sum due from said company to the state of Indiana, plaintiff herein, for the use of its common schools, but this defendant always denied any and all such liability and indebtedness and continuously refused to pay anything on account thereof.

Defendant says that pursuant to the agreement hereinbefore set forth, the state of Indiana, plaintiff herein, on the 28th day of May, 1875, instituted a suit for the recovery of money, against this defendant, in the superior court of Marion county, Indiana, such suit being brought on the relation of the then attorney general of said state of Indiana. And thereupon this defendant, pursuant to the terms of said agreement, entered its appearance to said suit, and on the 18th day of June, 1875, filed its demurrer to the complaint therein. And on the 6th day of March, 1876, said demurrer was sustained; thereupon the state of Indiana, plaintiff in said suit, failed and refused to amend the complaint therein and elected to stand by said complaint, and thereupon final judgment was rendered March 9, 1876, by said superior court in this defendant's favor.

Defendant says that from this judgment an appeal was taken by the state of Indiana to the general term of said superior court, and on May 29, 1876, said judgment was affirmed, and thereupon said state of Indiana appealed to the supreme court of said state, and on such appeal the judgment aforesaid of the Marion superior court was affirmed.

And defendant says that the matters adjudicated in said cause were and are one and the same with those mentioned in the complaint herein, and that said judgment of March 9, 1876, was a full, final and complete settlement of all matters connected with or in any way referring to any and all claims of the state of Indiana against this defendant for the payment by defendant of any portion of its profits to the treasurer of state for the use of the common schools of the state of Indiana, under the said act of January 26, 1847, and the acts amendatory thereof and of all matters connected with or in any way referring to the claim of the state of Indiana for an accounting with, or the pay-

ment by this defendant to said state of Indiana, for the use of its common schools, of any portion of the profits or earnings of defendant under the terms of said original charter, or of the acts amendatory thereof.

Defendant says that the state of Indiana, plaintiff herein, and the relator herein were fully advised of all the foregoing facts prior to the regular session of the general assembly of said state in 1897; that the bringing of said suit in the Putnam circuit court, the trial and pendency of said suit in the Owen circuit court and the execution of the agreement hereinbefore set forth, between said state and this defendant, were all reported to the governor of said state of Indiana by the attorney general thereof, and said report of the attorney general was by said governor submitted with his message to the general assembly of said state at its regular session in 1875, and the bringing of said suit in the Marion superior court, and the decision and judgment aforesaid rendered by said court in said suit in favor of this defendant, were likewise reported by the attorney general of said state to the governor thereof, and said report was submitted by said governor with his message to the general assembly of said state at its regular session in 1877.

Defendant says that notwithstanding these facts, the general assembly of the state of Indiana, at its regular session in 1897, at the suggestion and under the advice of the relator herein, passed, and the governor of said state approved, the four several acts of 1897, to which reference is made in the complaint herein, and that by the passage of said acts and by the prosecution of this action, the state of Indiana, the plaintiff herein, and the relator, the attorney general thereof, were and are wrongfully seeking to vacate and annul said judgment of March 9, 1876, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired previous to 1897 under the provisions of its original charter and the acts amendatory thereof, and to take this defendant's property for public use without just compensation, and to deprive this defendant of its property and the enjoyment thereof without due process of law, all of which acts and doings on the part of the state of Indiana and the relator herein are in violation of section 10 of article 1 of the constitution of the United States, and of article 5 and of section 1 of article 14 of the amendments to said constitution." Rec. 47.

"Paragraph 11. That each and all of the alleged fraudulent acts and doings of this defendant set forth in the complaint

herein were known to the state of Indiana, plaintiff herein, and to its attorney general, more than twenty-five years ago, and prior to 1872 the said plaintiff filed against this defendant in the circuit court, in and for the county of Putnam and state of Indiana, an information, seeking a forfeiture of the charter of this defendant because of certain alleged acts and doings of the defendant set forth in said information, which acts and doings so set forth were and are identical with the acts and doings set forth in the complaint herein, and upon which plaintiff now bases its right to recover herein; that said action was taken on change of venue to the circuit court in and for the county of Owen and state of Indiana, and a trial thereof, which was had in the year 1874, resulted in a disagreement of the jury; that thereupon the plaintiff herein abandoned the further prosecution of said action, and on the 28th day of May, 1875, instituted a suit against this defendant in the superior court of Marion county, Indiana, to recover money which it was alleged was due to the state of Indiana from the defendant under the terms of defendant's charter set forth in the complaint herein; that the complaint in this last named suit set forth each and all of the alleged fraudulent acts and doings of this defendant exactly as the same were set forth in said information and are set forth in the complaint, to which this is an answer, and in said last named suit the said state of Indiana based its claims to recover the money alleged to be due to it from this defendant, upon the same identical allegations that are stated as a basis for recovery in the complaint to which this is an answer; that on the 18th day of June, 1875, defendant filed its demurrer to the complaint in the suit aforesaid, and on the 6th day of March, 1876, said demurrer was sustained, and thereupon the state of Indiana, plaintiff in said suit, failed and refused to amend the complaint therein and elected to stand by said complaint, and thereupon final judgment was rendered March 9, 1876, by said Marion superior court in this defendant's favor.

Defendant says that from this judgment an appeal was taken to the general term of said superior court, and on May 29, 1876, said judgment was affirmed, and thereupon said state of Indiana appealed to the supreme court of said state, and on such appeal the judgment aforesaid of the Marion superior court was affirmed, and from this last affirmance of said judgment until the bringing of this action, the said state of Indiana fully acquiesced in the decision rendered as aforesaid in this defendant's favor by the superior court of Marion county and took no steps what-

ever to assert any claim against this defendant, nor to enforce the collection of any such claim in any manner whatsoever.

Defendant says that in the year 1887 a majority of all its outstanding capital stock was sold by the then holders of it to purchasers in good faith, who paid full value therefor without notice or knowledge of any kind whatsoever that the state of Indiana had or pretended to have any claim against this defendant, based upon the old charter of 1847, which said charter, together with all the amendments thereof this defendant surrendered in 1873, and the said state of Indiana accepted the surrender thereof without asserting or reserving the right to assert any claim against this defendant because of any of its acts and doings during the time said charter was in force and effect.

Defendant further says that in August, 1893, a controlling interest in the whole capital stock then outstanding of this defendant was again sold for full value to purchasers in good faith, who bought and paid for the same without notice or knowledge of any kind or description that the plaintiff herein claimed any right whatever to recover anything from this defendant, because of any money due to the state of Indiana under the terms of the charter set forth in the complaint herein, and the last purchasers of said controlling stock still hold the same, and the value thereof, together with the value of all the rest of the capital stock of this defendant, will be greatly reduced, if not destroyed, should the plaintiff herein be permitted to enforce the claim now set up by it against this defendant in the complaint herein.

Defendant further says that, relying upon the acquiescence of the state of Indiana in the judgment aforesaid, rendered in this defendant's favor by the said superior court of Marion county, defendant largely extended its operations, and has handled its property and funds and incurred large obligations, believing that it had a perfect right so to do, without being called upon to account for or pay over any of its profits made prior to the year 1873 to the state of Indiana, and should this defendant now be compelled to account for and pay over to said state of Indiana the profits now claimed in this action, it would work a great and irreparable injury to this defendant and its stockholders, and render it unable to perform its obligations or carry on its business.

Defendant says that all the matters and things herein set forth are well known to said state of Indiana, and in anticipation of this defendant's inability to pay the claim now sought to be en-

forced in this suit, the general assembly of the state of Indiana, at its regular session in 1897, authorized the purchase, at judicial sale, of this defendant's property, and directed the governor of said state, with the concurrence and consent of the secretary of state and auditor of state, to designate and appoint the proper officers to take charge of and operate said property, or to lease the same until provision should be made by the general assembly for the disposition of said property.

Defendant says that notwithstanding the premises, the said state of Indiana, plaintiff herein, and the relator, the attorney general of said state, are now wrongfully seeking to vacate and annul said judgment of the superior court of Marion county, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired previous to 1873 under the provision of its original charter, and the acts amendatory thereof, and to take this defendant's property for public use without just compensation, and to deprive this defendant of its property and the enjoyment thereof without due process of law, all of which acts and doings on the part of said state of Indiana and said relator are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5 and of section 1 of article 14 of the amendments to said constitution.

Defendant further says that all the persons who, either as directors or other officers, or agents, managed and controlled its affairs for the first twenty years of its existence died before the commencement of this action, as did also many of those who controlled and managed its affairs between 1867 and 1877, and defendant is, therefore, unable to properly defend against the alleged wrongs set forth in the complaint herein, and may be wholly prevented from making successful defense in this action by reason of its inability to procure the testimony of those persons who controlled and managed its affairs as aforesaid, and who died previous to the commencement of this action, and previous to any assertion on the part of the state of any right whatever to recover any part of the profits earned by this defendant in the operation of its railroad prior to 1873.

Defendant further says that ever since the judgment, rendered in its favor as aforesaid by the superior court of Marion county, was affirmed by the supreme court of Indiana, the said state of Indiana, plaintiff herein, has, with full knowledge of all the facts, permitted this defendant to deal with its railroad and the earnings and profits thereof, under the belief always entertained by this defendant that said judgment was recognized by said state of Indiana as being a final settlement of all questions

concerning said state's claim to any part of the profits earned by this defendant in the operation of its railroad under the charter aforesaid of 1847, as originally granted, or afterwards amended; and defendant says that for twenty years said state of Indiana took no steps whatever to impeach said judgment and prior to the bringing of this action neither claimed nor pretended that it had any right so to do, or to assert that in the proceedings which resulted in said judgment the right of said state of Indiana to recover from this defendant any part of the profits earned in the operation of said railroad were not fully presented and adjudicated." Rec. 58.

The court sustained a demurrer to the foregoing defense. Rec. 63.

The issues joined were upon the complaint, the first, third and ninth paragraphs of the answer, and the replies in denial to the third and ninth paragraphs of answer. Upon the closing of the issues the case was referred to Noble C. Butler, as master commissioner, to hear and report to the court the evidence, with his findings of fact and conclusions of law. Pursuant to this order he reported the evidence and his finding that the plaintiff was not entitled to recover any thing from the defendant. Rec. 68. Exceptions were filed to this report by the plaintiff and also by the defendant, and the cause was submitted to the court for final decree upon the master's report, the evidence taken and returned by him with his report as part thereof, and the exceptions to the report. The court passed upon the various exceptions to the master's report and rendered judgment in favor of the state for $913,905.01. Rec. 104. The computation by which the court arrived at this sum is shown at pages 101-103 of the record.

The bill of exceptions contains the master's report, all of the evidence accompanying it, upon which the cause was tried and determined, the exceptions filed by the plaintiff and the defendant respectively to the report, the rulings of the court on these exceptions, and preserves the exceptions taken to those rulings. It begins on page 109 of the record and ends on page 642. The facts are not disputed.

The complaint admits that the legislature never regulated the

tolls and freights and never called for a statement of the expenditures, expenses or profits of the company. As excuse therefor it alleges that the company, prior to the surrender of its charter in 1873, bribed the legislature and made false and fraudulent representations concerning its investments and earnings, and that these fraudulent acts "were done by the defendant company for the purpose of keeping concealed from the State and the general assembly the knowledge that the time and situation had arrived upon which the State could and should interpose to regulate the tolls and freights of the defendant company, and that by the acts and doings of the defendant company the said defendant did deprive the State from ascertaining and knowing that the profits realized exceeded the cost of said railroad to the stockholders, and ten per centum per annum interest thereon, and did thereby prevent the State and the general assembly thereof from obtaining the knowledge and information necessary to place it in a condition in which it could interpose to regulate said tolls and freights, and that but for said fraudulent acts of said defendant company the general assembly of the State should have interfered and regulated the tolls and freights of said company, as it was authorized to do by the terms and provisions of said charter, and would have made provision requiring the payment of the excess over and above the fifteen per centum per annum permitted to be divided among its stockholders, to be paid to the treasurer of state for the use of common schools." Rec. 12.

Upon this subject the master made the following finding: Rec. 85.

"The complaint makes divers and sundry charges of actual and positive fraud against the corporation and its officers and directors. These charges are not sustained by the evidence. It does not appear from the evidence that the corporation either directly or indirectly misrepresented any facts to the State, or wilfully concealed any facts from the State, or was guilty of any fraudulent acts or omissions which misled the State in any way."

The court found that "the master was warranted in finding that the evidence did not make a case of fraud." Rec. 100.

The opinion of the Supreme Court of Indiana affirming the judgment of the Superior Court of Marion county is reported in 159 Ind. 438; 65 N. E. 401, and is printed at p. 652 of the record.

The company's charter was perpetual, and not subject to amendment or repeal. Section 36 originally reserved that right, but it was repealed, before the company began operations, by section 7 of the act approved February 16, 1848, and thereafter the charter was not subject to alteration or repeal.

ASSIGNMENT OF ERRORS.

The following statutes of the State of Indiana are repugnant to the contract clause of the Constitution of the United States (section 10, article 1), and to section 1 of the Fourteenth Amendment, viz: the act approved January 27, 1897, the act approved February 18, 1897, the act approved February 24, 1897, and the act approved March 4, 1897.

The judgment under review gives effect to these statutes, deprives the plaintiff in error of property without due process of law, denies to it the equal protection of the laws, destroys its vested rights, and impairs the obligations of its contracts with the State under its charter and under the surrender thereof on January 17, 1873.

ARGUMENT.

I.

The Federal Questions were raised properly and in due time.

The immunities claimed by the company under the Constitution of the United States were properly and specifically presented in the State court, first, by the demurrer to the complaint (Rec. 36) and, when that was overruled, by paragraphs 2, 3 and 11 of the answer (Rec. 47, 50, 60), and were preserved by proper assignments in the Supreme Court of Indiana, and by an assignment of errors annexed to and returned with the writ of

error issued by this court, in compliance with Rev. Stat. U. S. sec. 997. Rec. 687.

II.

In determining whether the legislation of 1897 impairs the obligation of prior contracts between the company and the state, this court will construe the contracts for itself, and will determine the effect thereon of the subsequent legislation.

In Yazoo & Mississippi Railroad Company vs. Adams 180 U. S. 41, 44, Mr. Justice Brown said:

"There is no doubt of the general proposition that, where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon the contract, though it may differ from that of the Supreme Court of the State."

In Citizens Bank vs. Parker, 192 U. S. 73, 85, Mr. Justice McKenna said:

"When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and, also, all of that which is claimed to have taken it away. We are certainly not confined to the decision under review. To hold that would surrender the power of review."

These cases only recognize and enforce the well settled rule of this court declared in many earlier cases. They are referred to by Mr. Justice Jackson in Mobile & Ohio Railroad vs. Tennessee, 153 U. S. 486, at p. 492 et seq.; by Mr. Justice Brewer in McCullough vs. Virginia, 172 U. S. 102, at p. 109, and by Mr. Justice Shiras in Wilson vs. Standefer, 184 U. S. 399, at pp. 411, 412.

In Chapman vs. Goodnow, 123 U. S. 540, 548, Chief Justice Waite said:

"If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to, and the right directly refused."

To the same effect is Grand Rapids & Indiana Railway Co. vs. Osborn, 193 U. S. 17.

III.

The Statutes of 1897 are all repugnant to the Constitution of the United States.

By the first of these acts passed January 27, 1897, the legislature, notwithstanding the surrender of the company's charter and the prior adjudication in its favor, recited that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section," and ordered the company to file a statement of its receipts, expenditures, profits and the disposition thereof from January 26, 1847, to January 17, 1873, inclusive. The only right to call for such a statement was under a charter of which the State had accepted an unconditional surrender twenty-four years before.

The second act passed February 18, 1897, undertook to amend the statute under which the company had surrendered its charter and had acquired vested rights, twenty-four years before, and the third, passed February 24, 1897, undertook to revive and amend section 23 of the charter of 1847, which never was subject to amendment, and which, moreover, had been surrendered twenty-four years before. The extent to which these two statutes impair the obligation of contracts and the ruthless manner in which they undertake to destroy vested rights is best disclosed by placing the original sections and the amendments in parallel columns:

Section 36 of the general railroad law as it existed when the company surrendered its charter, January 17, 1873.	The Section as amended February 18, 1897. The proviso is new.
"Sec. 36. Any existing railroad company may acquire all of the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company.	"Sec. 36. All existing railroad companies may acquire all the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company, and the acceptance of any part of this act shall be deemed and taken to be an

The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized; and, thereupon, said company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified as fully as it would have had and been if organized under this act."

acceptance of the whole act, and thereupon such company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified as fully as they would have had and been if organized under this act: Provided, however, That whenever any railroad, organized under any special charter granted by the State of Indiana, shall hereafter accept or shall have heretofore accepted the provisions of the general railroad law as embodied in said act, approved May 11, 1852, all rights and liabilities, *whether inchoate or complete*, in favor of the State of Indiana, shall be, and they are hereby, expressly reserved to said state, notwithstanding such acceptance, and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the general assembly may deem appropriate, and notwithstanding such acceptance, any and all provisions of said charter may be amended, revised, repealed or added to *as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May* 11, 1852."

Section 23 of the Charter of 1847.

"Sec. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a divi-

Section as amended February 24, 1897.

"Sec. 23. That when the aggregate amount of dividends declared *or earned* received in excess of the operating expenses of said road shall amount or shall have amounted to the full sum invested in the construction of said road, with ten per cent. interest per annum thereon, the general assembly may so regulate the tolls and freights that not more than fifteen per centum per annum upon the amount invested in the construction of said road, shall be divided on the capital so invested in such construction, but the corporation shall not be compelled by law to reduce the tolls and freights

dend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same."

so that a dividend of fifteen per centum per annum upon the actual capital that has been invested in said road shall not be made; and it shall be the duty of the corporation to furnish the general assembly, from time to time, whenever required, with correct statements of the amount of its expenditures, not only in the construction of said road, but also in the operation thereof, and the amount of profits after deducting all operating expenses, which statements shall be made under the oath of the officer, or officers, whose duty it shall be to make the same; and at all times after the aggregate amount of the dividends declared shall amount or shall have amounted to the sum used in the construction of said road and ten per centum per annum thereon, the surplus profits, after reserving for division, or after making dividends at the rate of fifteen per centum per annum, and after reserving such reasonable proportion as may be necessary to provide for future contingencies, shall be semi-annually, on the first Monday in July and December of each year, paid over to the treasurer of state for the use of common schools. And the general assembly may, from time to time, as it may deem expedient, take such steps as it may deem necessary to compel said railroad company to comply with the provisions of this section, as herein amended, and to account for and pay over said moneys and said excess of profits to said treasurer of state for the use of said schools, and whenever said general assembly shall require an accounting from said railroad company such accounting shall cover the entire period covered by the operation of said road from its acceptance of its charter up to and including the period when said railroad company may have accepted the provisions of the general railroad law of the state. *And the right of the state* upon any such in-

> quiry or upon any suit that may be authorized to compel such accounting *shall be the same as though this amendment had been originally a part of the charter of said railroad and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the state:* Provided, however, That nothing in this act contained shall be in anywise construed as lessening, impairing or releasing in any manner any right of or any liability to the state of Indiana by reason of anything contained in said original charter; all of which rights and liabilities are expressly reserved to said state as fully as though this section had not been amended.'

Having thus declared ex post facto that the company's surrender of its charter in 1873 was inoperative, and having revived and amended the surrendered charter to suit itself, the legislature proceeded, by the fourth and last act of the series, to deal with the surplus profits of the company, earned between 1847 and 1873, in excess of a certain sum, by saying that "the same are hereby declared to be due and payable to the treasurer of state for the use of common schools and are hereby appropriated to that purpose" (sec. 1), and the attorney general was directed to sue for their recovery.

By section 36 of the original charter the legislature reserved "the right to alter or amend this charter at any time, and to repeal the same, whenever its provisions shall have been violated by said company" Rec. 22. Before the company had taken any action under the charter, this section (36) was repealed by section 7 of an act approved February 16, 1848 (Local Laws, 1848, p. 530), and thereafter the charter was not subject to amendment, alteration or repeal.

IV.

The effect given to the legislation of 1897, by the judgment under review, is to create rights in favor of the state, and to impose obligations upon the company, and not merely to provide a remedy for pre-existing causes of action.

This proposition results from two propositions established by the decision of the Supreme Court of Indiana, and declared in its opinion; (1) that the State had no cause of action when the company surrendered its charter on January 17, 1873 (Rec. 668, 669, 672), and (2) that further action on the part of the *legislature* was necessary to give the state a cause of action. Rec. 672. The court announced these propositions in holding that the judgment of 1876 was not a bar to the present suit, for the reason, among others, that the State had no cause of action in 1875, when that suit was instituted. The court said "No duty rested upon the corporation to pay any sum to the treasurer of State, and no right of action rested in the State for the recovery of money, with or without a demand. The duty to account when required, as imposed by section 23, means nothing more or less than the duty to settle, and pay over to the treasurer of State any surplus disclosed when requested or demanded *by the legislature* to do so. * * * We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the general assembly. This request was not made until 1897, and *no actionable default by appellant had occurred prior to that date.*" Rec. 668, 669.

Again,

"When the attorney general commenced the suit of 1875 the State had no right of action against appellant, and whether it ever did have a right to sue, depended upon the refusal of appellant to account when requested to do so by the legislature." (Rec. 672).

And in refusing to give effect to the judgment in that action, on the ground that it was not an adjudication on the merits, the court says:

"There can be no merits where there exists no cause of action." Rec. 672.

But if the State had no cause of action in 1875, which was two years after the company had surrendered its charter unconditionally and without reservation; if nothing was due to the State at that time, because no default on the part of the company had then occurred, the effect necessarily given, by the judgment under review, to the legislation of 1897 is not merely to provide a remedy, but to impose an obligation and create a right. And this follows notwithstanding the disclaimer of the Supreme Court of Indiana, and the statement in its opinion that the legislation of 1897 "is appealed to only as providing a remedy for enforcing the pre-existing charter obligations of appellant," and that "to this extent it is valid." Rec. 655. A contingent liability which can only ripen into an obligation as the result of future *legislation*, which may or may not take place, is not a present obligation, and the legislation which converts it into an obligation can not be regarded as providing a remedy only. To perfect an obligation is the same thing as to create it, for there can be no obligation in the absence of an element essential to its existence. There is only a contingent or inchoate right or liability, which may never ripen into a real right or obligation.

In Bass vs. Roanoke Navigation and Water Power Co., 111 N. C. 439, 449, the court said:

"A claim contingent upon action by the legislature or by the executive department of the State, which may never be taken, would seem clearly so remote and uncertain as to fall under the denomination of an expectancy, subject to destruction by the power which alone could create the contingency, or could refrain from doing so at its pleasure."

The distinction between a statute, which provides a remedy only, and one which imposes an obligation, is considered by the Supreme Court of Ohio in Commissioners vs. Rosche Brothers, 50 Ohio St. 103, 112, which was a suit under a statute authorizing the recovery of taxes, voluntarily paid, on property which was not subject to taxation. The court held the statute uncon-

stitutional on the ground that it imposed an obligation on the county for past transactions where none existed at the time the taxes were paid. The court said, p. 112:

"When the defendants in error voluntarily, though erroneously, listed their property, and voluntarily paid the taxes assessed upon it, neither by statute nor by any principle of the common law as administered in Ohio, was an obligation imposed upon the county of Hamilton to refund the money received. If such an obligation had existed, the forms of procedure then provided by our system of practice, were ample to afford complete relief. The obstacle in the way of the defendants in error was not inadequate methods of procedure, but the absence of a law vesting in them a right of recovery. This want the statute under consideration attempted to supply.

This statute, it is contended, is remedial, and remedial statutes may be retroactive. It is remedial no doubt, in that enlarged sense of that term, where it is employed to designate laws made to supply defects in, or pare away hardships of, the common law, but not remedial in the sense of providing a more appropriate remedy than the law before afforded, to enforce an existing right or obligation. The statute under consideration provided no new method of procedure; it simply imposed upon Hamilton County an obligation towards these plaintiffs in error that did not attach to the transaction when it occurred. In attempting to accomplish this result the legislature transcended its constitutional powers."

And again, at p. 111:

"Judge Story defines a retrospective, or retroactive law, as follows: 'Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.' The Society, etc. vs. Wheeler, 2 Gall. 104-139. This definition was approved by this court in Rairden et al. vs. Holden, 15 Ohio St. 207. It was also adopted by the Supreme Court of the United States in Sturges vs. Carter, 114 U. S. 511."

The distinction between a statute which provides a remedy and one which creates a right, and the necessity for legislation of the latter sort in order to make this company liable to the

State, is pointed out in the message of the relator to the general assembly of Indiana, with which he inaugurated his campaign of confiscation. On January 25, 1897, he laid before the house of representatives of the general assembly of Indiana, a communication in writing, which is printed at pages 300-306 of the house journal of the session of 1897. It refers to the original charter, the quo warranto proceedings in the Owen Circuit Court, the joint resolution of March 10, 1873, the suit in the Superior Court of Marion County instituted in pursuance thereof in 1875, and the judgment in favor of the company in that case. Concerning the complaint in that suit he says (p. 303):

"In the complaint heretofore referred to, it is alleged in the first and second paragraphs that there was due to the State a million and a half of dollars; in the third paragraph it is alleged that there was one hundred thousand dollars due to the State for moneys illegally demanded and received for the transportation of troops, munitions of war. As to the third paragraph, I think the adjudication is probably a complete bar; as to the first and second paragraphs I think it probable that the adjudication is a bar to any further action, unless the general assembly shall by antecedent legislation make a case different from the one presented then, and to do that successfully will require the exercise of wise legislative discretion."

The report concludes: "I beg to urge that hearty co-operation between the two houses to adopt the much needed legislation, without which nothing can be done" p. 306.

It is thus evident that what the attorney general proposed was not to provide a remedy for an existing cause of action, but to make a new case "by antecedent legislation." He uses the expression "a case different from the one presented then" [1875], but he knew that the State had no case in 1875, as the court had decided. The "difference" with which he was confronted was between no case and a good case, and the problem was to supply the latter by "wise antecedent legislation," "much needed legislation." This the house proceeded to do without delay. It suspended the rules and on the same day passed the act which the attorney general had submitted with his re-

port, solemnly reciting, in the face of the surrender of the company's charter and the adjudication of 1876 in its favor, that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana," etc.

The legislation of 1897 was not necessary to provide a remedy.

If the company was indebted to the State when the foregoing act was passed, or at any time between January 17, 1873, when it surrendered its charter, and 1897, the attorney general had ample authority to sue for the debt. The legislation of 1897 was not necessary for that purpose. The Superior Court so held in overruling the demurrer to the complaint in the case at bar, saying, Rec. 42:

"It is claimed by the State that the judgment in said cause is void, for the reason that the attorney general, who as relator instituted the suit, had no authority to do so, and that having no authority, the court acquired no jurisdiction over the State so as to make the judgment binding on the State.

The contention is that the attorney general had no authority of his own motion to move in the matter, but that he must first be required to appear either by notice from the clerk of the court in which the suit was pending or by authority in writing from the governor or from a majority of the state officers, and that in no other way could he acquire authority to represent the State in such suit. To this contention we do not assent. Section 5668 R. S. 1881, provides that it shall be the duty of the attorney general to cause suit to be instituted to recover money due from any source where the same is required by law to be paid to the State or any officer in trust for the State.

Under this section it has been held that the attorney general was the proper relator to sue for money due to the common school fund. Board vs. The State, 92 Ind., 353. There are numerous other cases in our state reports where the attorney general has appeared as relator in suits to recover money due to the school fund. While true, in these other cases the question was not raised as to the right of the attorney general to appear as relator, yet they are examples as to what has long been the practice in this state. Our conclusion therefore on this point, is that the attorney general had authority to appear as relator in such suit."

The Revised Statutes of 1852, p. 146 (carried into the Revision of 1881 as section 5611, and in force at all times after May 6, 1853, up to the present time) thus defined the duties of the auditor of State.

"He shall—

* * *

Sixth. Institute and prosecute, in the name of the State, all proper suits for the recovery of any debts, moneys, or property of the State, or for the ascertainment of any right or liability concerning the same.

Seventh. Direct and superintend the collection of all moneys due to the State, and employ counsel to prosecute suits, instituted at his instance, on behalf of the State."

The act of March 10, 1873, p. 18, carried into the Revision of 1881 as section 5668, and in force at all times after March 10, 1873, up to the present time, contained the following provision with respect to the attorney general of the State.

"It shall be the further duty of the attorney general to ascertain, from time to time, the amounts paid to any public officer of the State or any county officer or other person, for unclaimed witness fees, court docket-fees, licenses, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, or from any other source where the same is, by any law, required to be paid to the State or to any officer in trust for the State; and in all cases where the officers whose duty it shall be to collect the same shall fail, neglect or refuse, for twelve months after the cause of action in favor of the State shall have accrued, or shall fail, neglect, or refuse to sue for and proceed to recover any property belonging to or which may escheat to the State, the said attorney general shall institute, or cause to be instituted and prosecuted, all necessary proceedings to compel the payment of or recovery of any such property."

In State, ex rel. Atorney General vs. Denny, 67 Ind. 148, 159, the Supreme Court, construing the foregoing statute, said:

"It is the true intent and meaning of this supplemental act, as we construe its provisions, that the attorney general of this State shall be and is thereby authorized to collect at once, with or without suit, all amounts paid to any public officer of the

State, or any county officer or other person, and not paid by such officer or person into the proper treasury as required by law, for unclaimed witness fees, court docket fees, license, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, and all amounts due from any other source, where the same was, by any law, required to be paid to the State, or any officer in trust for the State: except as to fines, forfeitures, and property escheating or belonging to the State, which he may not collect with or without suit, or sue for the recovery of, until after the expiration of one year from the time the cause of action has accrued therefor, and then only in the event that the proper prosecuting attorney has failed, neglected or refused, for and during the said year, to collect the same, or to institute proceedings for the recovery thereof."

In Carr vs. State ex rel. Attorney General, 81 Ind. 342, the court at p. 347 quotes the foregoing passage from the opinion in State vs. Denny, and says:

"With this construction we are content to abide. It permits the attorney general, as from time to time he may ascertain that there is proper cause for it, to bring suits in behalf of the State, though he is not required to sue, except in cases where other officers whose duty it shall be to collect or sue shall fail or refuse to act for twelve months after the cause of action in favor of the State shall have accrued. We perceive no reason for saying that there is any inconsistency between this act, which confers upon the attorney general power to collect and to sue, and the previous acts referred to, which conferred similar powers on other officers. They may well stand all together, and whichever officer first institutes a suit will have the precedence."

In Board vs. State, 92 Ind. 353, the court held that the attorney general was the proper relator to sue for money due to the common school fund.

The following joint resolution of July 7, 1873, Acts of 1873, p. 245, was carried into the Revision of 1881 as section 5672, and into Burns' Revision of 1901 as section 7701, and has been in force from July 7, 1873, to the present time:

"The attorney general is hereby authorized, directed and re-

quired to take charge of, conduct, prosecute, discontinue or dismiss, and have control of, any and all suits and proceedings now pending or which may hereafter be instituted in the name of the State of Indiana, on the relation of the State of Indiana, by any prosecuting attorney against any and all railroad companies or corporations in the nature of a quo warranto, or otherwise, and to adjust, settle or compromise any and all claims the State may have against such company or corporation, in such manner and on such terms as he may think proper, and receive payment of such claim in money, bonds, stocks or mortgages, which money, bonds, stocks or mortgages shall by such company or corporation, be paid over to the treasurer of State, under the direction of the attorney general. Provided, That any suit or suits now pending, or which may hereafter be brought, shall be dismissed, adjusted, settled or compromised, whenever the same shall be directed, in writing, by the governor and lieutenant-governor, and upon such terms and conditions as they shall direct."

In United States vs. San Jacinto Tin Co., 125 U. S. 273, 278, Mr. Justice Miller said:

"It is denied that the attorney general has any general authority under the Constitution and laws of the United States to commence a suit in the name of the United States to set aside a patent, or other solemn instrument issued by proper authority.

It is quite true that the Revised Statutes, in the title which establishes and regulates the Department of Justice, simply declares, in section 346, that "there shall be at the seat of government an Executive Department to be known as the Department of Justice, and an attorney general, who shall be the head thereof." There is no very specific statement of the general duties of the attorney general, but it is seen from the whole chapter referred to that he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of the other departments of the government. There is no express authority vested in him to authorize suits to be brought against the debtors of the government, or upon bonds, or to begin criminal prosecutions, or to institute proceedings in any of the numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits, and all the district attorneys who do

bring them in the various courts in the country are placed under his immediate direction and control. And notwithstanding the want of any specific authority to bring an action in the name of the United States to set aside and declare void an instrument issued under its apparent authority, we can not believe that where a case exists in which this ought to be done it is not within the authority of that officer to cause such action to be instituted and prosecuted. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government."

The legislation was necessary to create a cause of action.

We have shown that the legislation of 1897 was not necessary to provide a remedy. It was necessary for the purpose of creating a right in favor of the State and of imposing an obligation on the part of the company, and was so treated by the Supreme Court of Indiana. What was lacking prior to 1897, in the view of that court, was not a mere demand on the company by the executive department of the State to pay a debt, due but payable only on demand, for the opinion says that in 1875 "no right of action rested in the State for the recovery of money with or without a demand" (Rec. 668). The opinion declares further that whether the State would have a right to sue in the future depended altogether upon the will of the legislature (Rec. 672). In other words, according to the decision of the Supreme Court of Indiana, the State reserved the power under the charter of 1847 to impose a liability upon the company by future *legislation*. But that power existed only so long as the charter remained in force, and fell with its surrender. The legislature could not impose a liability under a charter which had been surrendered by agreement, none existing at the time of the surrender, and the right to impose it not being reserved.

Suppose the State had repealed the charter prior to 1873 with the consent of the company and without reservation (which was the effect of the surrender of 1873); could the legislature twenty-four years, or a hundred years, or a thousand years

afterwards, exercise a power existing only under the charter, and not reserved in the repeal? When the legislature, by the act of January 27, 1897, called upon the company to render an account of its receipts, expenses and profits from 1847 to January 17, 1873, as a foundation for the subsequent proceedings, there was no law or charter in force authorizing such action. All authority under the charter of 1847 had expired, and the legislature had no more right to call for a statement of this company's earnings and profits, for the purpose of taking steps to appropriate them, than to call for a similar statement of the earnings and profits of a private citizen.

V.

The power of the legislature to make the company liable for past earnings expired when the company surrendered its charter and the state accepted the surrender, without reserving any rights.

When the company surrendered its charter it owed nothing to the State, and might never owe anything. Even if the charter remained in force, it would become indebted to the State only in the event that the legislature should see fit to pass an act requiring it to account. There was no present debt or fixed liability, but only power under the charter to *legislate* in the future so as to impose a liability. This is clear upon the construction which the Supreme Court of Indiana has put upon the charter. Could the legislature exercise that power so as to impose a liability, after the State had accepted an unconditional surrender of the charter?

The effect of the surrender is disposed of by the Supreme Court of Indiana in three lines, with the statement that "the acceptance in 1873 of the general railroad law of 1852 had no effect in relieving the appellant from unperformed duties, assumed in its charter contract of 1847." Rec. 673, 674. But there were no unperformed duties when the company surrendered its charter, as we have abundantly shown by quotations from the opinion of the court, nor any liability of any sort, but at most a right on the part of the State to impose a liability by

future legislation, a right which was not reserved in accepting the surrender of the charter, and which therefore expired when the charter became defunct.

The surrender of the charter was equivalent to its repeal, with the consent of the company; and the well settled rule is that the repeal of a statute, without a saving clause, takes away all powers which depend upon the statute, that have not been exercised and are not reserved. The rule is thus stated by text writers:

"Rights depending on a statute, and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute." Sutherland, Stat. Cons. Sec. 163.

"The general rule is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it had never existed." Sutherland Stat. Cons. Sec. 162.

"A statute repealed by a later act is, in the absence of provisions to the contrary, considered, as to its operative effect, as if it had never existed, except as to matters and transactions past and closed." 26 Amer. & Eng. Ency. of Law, 2d Ed. p. 745.

"The repeal of a statute, in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it, while it leaves unimpaired those which either have become vested, or, though connected with it, have an independent existence." 26 Amer. & Eng. Ency. of Law, 2d Ed. p. 747.

"The naked repeal of a statute conferring a power or privilege destroys the right to exercise it, and abates suits pending to enforce it." 26 Amer. & Eng. Ency. of Law, 2d Ed. p. 752.

"Where an act expires or is repealed, it is, as regards its operative effect, considered, in the absence of provision to the contrary, as if it had never existed, except as to matters and transactions past and closed. As to all future matters, all steps yet to be taken, the repealed statute upon which they are based, is treated as utterly obliterated." Endlich, Interp. Stats. sec. 478.

"The same rule applies to rights and remedies founded solely

upon statute, and to suits pending to enforce such remedies." Endlich, Interp. Stats. sec. 480.

"If by virtue of some statute a right becomes vested upon the completion of some certain transaction, but not before, no right whatever will have been acquired if the statute in question is repealed before the transaction is complete." Hardcastle, Stat. Law, 3d ed. 374.

In Robison vs. Beall, 26 Geo. 17, 32, Benning, J., said:

"When the charter of a corporation expires, all things which owe their existence to the charter expire too, unless there is some special law to prevent them from doing so."

In Moor vs. Seaton, 31 Ind. 11, 13, the court said:

"Inchoate rights generally, derived under a statute, are lost by its repeal unless saved by express words in the repealing statute."

In Surtees vs. Ellison, 9 B. & C. 750, 752, Lord Tenterden, Chief Justice, said:

"It has been long established, that, when an act of parliament is repealed, it must be considered, except as to transactions past and closed, as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the legislature."

In Kay vs. Goodwin, 6 Barg. 576, 582, Chief Justice Tindal said:

"I take the effect of repealing a statute to be to obliterate it as completely from the records of the parliament as if it had never passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

In Miller's Case, 1 W. Bl. 451, which is one of the earliest, Miller instituted proceedings to be discharged under the insolvent debtor's act, but before he had finally established his right and obtained his discharge, the statute was abolished without a saving clause. The court held that his right to a discharge and the jurisdiction of the court to grant it, fell with the repeal of the statute.

There are many cases in this court in which the rule has been applied, where statutes imposing taxes, creating penalties, giving new rights of action, or conferring jurisdiction have been repealed. They recognize the principle that when a statute is repealed, without a saving clause, all contingent interests and inchoate rights, and all proceedings begun, which have not ripened into vested rights, fall with the repeal.

Yeaton vs. United States, 5 Cranch, 281, is the first of these cases. It was an appeal in admiralty from a sentence of condemnation for breach of the act of February 28, 1806, prohibiting intercourse with certain ports in the Island of St. Domingo. The act expired after the sentence of condemnation, but before the case was heard on appeal in this court. The court held that the case was to be heard here de novo as if no sentence had been passed, and that the expiration of the law relieved the vessel from liability. Chief Justice Marshall said p. 283:

"It has long been settled on general principles that after the expiration or repeal of a law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some provision be made for that purpose by statute."

The Schooner Rachel vs. United States, 6 Cranch, 329, was a similar case except that the vessel had been sold under the sentence of condemnation and the proceeds paid over to the United States, while the act was still in force. The court held that that circumstance made no difference and made a general order for restitution of the property condemned.

In Ex parte McCardle, 7 Wall. 506, 514, which involved the repeal of a statute conferring appellate jurisdiction on this court, pending the appeal, Chief Justice Chase said:

"The general rule, supported by the best elementary writers, is that 'when an act of the legislature is repealed it must be considered, except as to transactions past and closed, as if it never existed.'"

In Railroad Company vs. Grant, 98 U. S. 398, 401, Chief Justice Waite said:

"It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. United States vs. Boisdore's Heirs, 8 How. 113; McNulty vs. Batty, 10 Id. 72; Norris vs. Crocker, 13 Id. 429; Insurance Company vs. Ritchie, 5 Wall. 541; Ex parte McArdle, 7 Id. 5[illegible] The Assessor vs. Osbornes, 9 Id. 567; United States vs. [illegible]en, 11 Id. 88."

Gurnee vs. Patrick County, 137 U. S. 141, and In re Hall, 167 U. S. 38, are later cases to the same effect.

In Bank of Hamilton vs. Dudley's Lessee, 2 Pet. 492, the court held that an order of sale, entered by the court of common pleas of Hamilton County, Ohio, after the repeal of the statute which conferred power upon the court to authorize administrators to sell lands of their intestates for the payment of debts, was void. It was urged that the interest of the administrators in the real estate as trustees for the creditors was a vested interest which the repeal of the law could not divest, but the court held otherwise.

Clapp vs. Mason, 94 U. S. 589, involved an internal revenue tax. A testator died devising real estate to his widow for life with remainder over. The remainderman came into possession after the law authorizing the tax, which was in force at the death of the testator, was repealed. The court held that he could not be taxed, saying:

"It is manifest that the right [to the tax] does not accrue until the duty can be demanded, that is, when it is made payable" (p. 519).

To the same effect are Mason vs. Sargent, 104 U. S. 689, and Sturges vs. U. S. 117 U. S. 363.

Similar was the effect of the repeal or surrender of the charter of 1847, at a time when nothing was due from the company, and prior to any action on the part of the legislature looking to the creation of a liability.

The rule has been applied frequently to mechanics' liens given by statute, where the requisite proceedings to fix the lien have not been completed at the date of repeal. Bailey vs. Mason, 4 Minn. 546; Holcomb vs. Boynton, 151 Ill. 294; Bangor

vs. Goding, 35 Me. 73, 56 A. Dec. 688; Frost vs. Ilsley, 54 Me. 345; Wilson vs. Simon, 91 Md. 1; Hanes vs. Wadey, 73 Mich. 178.

In Steamship Company vs. Joliffe, 2 Wall. 450, a pilot had tendered his services under a statute of California which declared that when a vessel is spoken by a pilot and his services are declined, he shall be entitled to one half pilotage fees. After Joliffe had recovered a judgment under the statute, and the steamship company had taken the case to this court on writ of error, the legislature of California repealed the statute, and it was claimed in this court by the attorney general of California that "by reason of the repeal, the present action can not be maintained." His position was "that as the claim to half-pilotage fees was given by the statute, the right to recover the same fell with the repeal of the statute; and that this court must dismiss the writ of error on that ground." 2 Wall. 456.

Mr. Justice Miller, speaking for the minority, quoted the language of Chief Justice Tindal in Kay vs. Goodwin, 4 Moore & Payne, 341, heretofore quoted in this brief, and referred to many other cases in support of the view taken by three of the justices, that the plaintiff had acquired no vested right; but the majority held that a perfected quasi-contractual right had accrued to him prior to the repeal of the statute. Mr. Justice Field, speaking for the majority said, p. 457:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

The distinction between a vested right under a statute, which the repeal of the statute does not affect, and an inchoate or contingent interest, which falls with the repeal, is pointed out in two other cases in this court.

Aspinwall vs. Commissioners of County of Daviess, 22 How. 364, involved statutes of the State of Indiana which made it the duty of the board of county commissioners to subscribe for the stock of a railroad company if a majority of the qualified voters at an election determined in favor of the subscription. An election took place in 1849 at which a majority of the votes were cast for the subscription, but before the subscription was actually made, the new constitution of Indiana took effect requiring all such subscriptions to be for cash. This court held that the railroad company had acquired no perfected right or vested interest to a subscription by virtue of the statute and the election; that its contingent interest fell with the adoption of the new constitution; and that bonds issued in pursuance of the subscription, made after the new constitution took effect, were invalid.

Baltimore & Susquehanna Railroad Company vs. Nesbit, 10 How. 395, involved a condemnation statute of Maryland. The jury had assessed, and the court had affirmed, the damages, and all other steps had been taken, except the payment of the money, when the legislature passed another act. This court held that the company had acquired no vested right, saying, p. 399:

"Thus it appears that it is the payment or tender of the value assessed by the inquisition which gives title to the company, and consequently, without such payment or tender, no title could, by the very terms of the law, have passed to them."

So under the charter of 1847, as construed by the Supreme Court of Indiana, an act of the *legislature* requiring the company to account, was essential to the creation of a right on the part of the State, and to the fixing of any liability, such as the law recognizes, against the company.

In Lamb vs. Schottler, 54 Cal. 319, 323, it was held that an appraisement of water rights to be acquired by a board of commissioners, gave no right to proceed to the actual acquirement of the rights, after the repeal of the statute. The opinion quotes the statement of Tindal, C. J., in Kay vs. Goodwin, 4 Moore & P.:

"The effect of a repeal I take it to be to obliterate the statute as completely from the records of Parliament, as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those suits that were commenced, prosecuted and concluded while it was an existing law."

In Terry vs. Dale, 27 Tex. Civ. App. 1. An act permitting the purchase of land owned by the State was repealed. The plaintiff claimed the land on the ground that before the repeal he had entered into written obligations to take it and had remitted to the State treasurer a draft for the per centum of the purchase money which the law required to be paid. The court said:

"When the law requires that certain steps must be taken or that incidents of title exist in order to vest a right, a partial compliance with its terms less than a full performance of all the conditions demanded will simply create an inchoate right, which the repeal of the law without a saving clause will destroy."

The court held that payment and not the sending of a draft, was required in order to vest title.

In Cushman vs. Hale, 68 Vt. 444, the petitioner, a public prosecutor, claimed one fourth of certain fines which were paid into the treasury of state after December 1, 1894, upon convictions prior to that date, from which appeals had been taken. The statute gave the prosecutor one fourth of the fines in such cases, but the court held that his right did not attach until the fines were paid, and that the repeal of the statute, after the convictions, but before the fines were paid, deprived him of his right thereto, although they were afterwards paid into the state treasury. The court said, p. 449:

"But on December 1, 1894 [the date of the repeal], the petitioner had no vested right to one fourth of what afterwards became fines paid into the treasury of state. He could not have maintained any action for this fourth, at that time. They had not then become fines. Whether they ever would, was subject to several contingencies. If the respondents entered their appeals in the county court, all that the petitioner had caused to be done in the lower court, in procuring conviction and sentence, would be vacated. They had indicated their purpose to enter

the appeals by taking them. Then the sentences were not absolutely for the payment of fines. It was at the election of the respondents to pay their respective fines, or to neglect to make such payment, and to submit to the alternative sentence at hard labor in the house of correction. In the latter case, the fine, as a money fine, would never exist or become enforceable. These contingencies prevented the petitioner's right to one fourth of these fines from becoming vested. * * * The most that then existed was an inchoate conditional expectancy that these prosecutions might ultimately ripen, as they did, into fines received by the state."

Van Inwagen vs. City of Chicago, 61 Ill. 31, involved an act under which insurance companies, not incorporated under the laws of the State, but doing business in Chicago, were required to pay into the state treasury two per cent. of the premiums on all insurance effected in the city. The act was repealed and the court held that the repeal took from the State the right to sue for the per cent. due on premiums under the act, prior to and at the time of the repealing statute, as the repealing act contained no clause saving such right. The court said, p. 34:

"We believe the rule is well settled that, as to inchoate rights, rights not carried into judgment, and so not executed, can not be, and are not, saved, in the absence of a saving clause in the repealing statute. The doctrine is, that *inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words* in the repealing statute, and unless those rights have become so far perfected as to stand independent of the statute: Butler vs. Palmer, 1 Hill, 324; that is to say executed. * * * The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Kay vs. Goodwin, 4 Moore & Payne, 341; Dwarris on Statutes, 676.

"The clear result of all the authorities is, when a statute, as in this case, gives a right in its nature not vested, but remaining executory, *if it does not become executed before a repeal of the law giving the right, it falls with the law, and it can not thereafter be enforced.*"

Curran vs. Owens, 15 W. Va. 208, involved a statute which

gave a right of action against saloon keepers who sold liquor to any person on whom the plaintiff was dependent for support when the plaintiff's right to support was infringed thereby. The plaintiff sued and had judgment which was reversed, and plaintiff filed an amended petition. The legislature meantime repealed the statute, and re-enacted it so as to make the right of action depend on having given prior notice to the saloon keeper not to sell. The defendant did not raise the question in the lower court, and the plaintiff had judgment. It was held by the Supreme Court that the plaintiff's cause of action was taken away by the repeal.

In Dillon vs. Linder, 36 Wis. 344, it was held that a right of action similar to that given in the foregoing case of Curran vs. Owens does not survive the repeal of the statute, even though a general law provides that "all actions at law or criminal prosecutions now pending or which may hereafter be commenced, founded on any statute of this state shall not be affected by a repeal of the statute." The court held that a right created wholly by statute can not survive the repeal of the statute.

In Bennett vs. Hargus, 1 Neb. 419, it was held that the right of an administrator to sue for an assault on deceased, being wholly statutory, falls with a repeal before suit brought.

In Kertschacke vs. Ludwig, 28 Wis. 430, the court held that a statute creating a right of action against the owner of a dog for injury by the dog without alleging a scienter, gives a cause of action unknown to the common law, and that its repeal after suit filed but before trial, puts an end to the case.

In Kood vs. C. M. & St. P. Ry. Co. 43 Wis. 146, a statute imposing a penalty on railroad companies for charging extortionate rates was repealed by a subsequent statute which contained a clause "provided that nothing herein contained shall in any manner affect any litigation now pending." The plaintiff had instituted his action before the repeal. The court held that it was not saved, saying, p. 153:

"The repeal obliterates the statute as if it had never been passed: obliterates the penalties of the statute, as if they had

never existed. That was within the legislative discretion. So it rested in legislative discretion to repeal the statute without a saving clause. * * * The legislature exercised its discretion by repeal without such saving clause. The legislature could not usurp the judicial function of declaring the effect of the absolute repeal, by the proviso that the repeal which anihilates the statute, shall not affect pending litigation thereunder * * * it is for the courts to say, not for the legislature, how the repeal of a statute may affect pending litigation."

VI.

The company never was liable to account to the State for surplus earnings, in the absence of legislation regulating its tolls.

If this be the true construction of section 23, which it is the duty of this court to determine for itself, no obligation, contingent or otherwise, survived the surrender of the charter in 1873, and the legislation of 1897 therefore impairs the obligation of the contract of surrender, and is an assault upon the vested interests of the company. If the grant of a corporate charter is a contract which is protected by the Constitution of the United States, as the court has repeatedly held, the surrender of a charter is also a contract and entitled to protection. If the company, upon a true construction of its charter, held its surplus earnings prior to 1897 as private property, free from any right of the State thereto, the effect of the legislation of 1897 and of the proceedings of the court thereunder, in this case, is to take the property of the company and to destroy the vested interests of its stockholders therein, as much so as if the legislation were directed against a private citizen, compelling him to account to the State for his earnings, or against a corporation which was under no obligation to pay any portion of its earnings to the State. Calling the statutes remedial does not change the fact, for they have been made effective, if this judgment stands, to transfer to the State property of the company, which would remain in its undisturbed possession, but for the statutes.

We have accepted thus far in our argument the construction put upon section 23 by the Supreme Court of Indiana, which, while holding that future legislation requiring an account is necessary to fix liability upon the company, rejects the claim that legislation regulating tolls is essential for that purpose.

The view which we take of the charter brings us face to face with the question, whether, upon a true construction of section 23, the State had any interest in the surplus earnings of the company, in the absence of legislation regulating its tolls.

For the convenience of the court in considering that question we print here the three sections of the charter which are necessary to be kept in mind in determining the true construction of section 23.

"Section 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road or any part thereof as shall be for the interest of said company, and to change, lower or raise at pleasure: Provided, That the rates established from time to time shall be posted in some conspicuous place or places on said road.

"Section 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses, which statement shall be made under the oath of the officer whose duty it shall be to make the same.

"Section 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon

thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses, and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper."

The construction which the Supreme Court of Indiana has put upon section 23 eliminates therefrom the words which we have marked in italics, and makes the section read as if those words were not there. But that is not permissible. Words can neither be added to nor subtracted from a statute. All the words employed are presumed to have been used for a purpose, and due effect must be given to them.

By section 22 the corporation is authorized to charge such tolls and freights as may be for the interest of the company, and to change, lower or raise them at pleasure. Section 23 is a limitation upon this power. It declares that when the aggregate amount of dividends declared shall amount to a certain sum, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided thereafter on the capital employed, but that the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per cent. per annum can not be made. It is manifest that the legislature could not in advance fix the tolls so that they would yield *exactly* fifteen per cent. No one could tell in advance precisely what the earnings and expenses of the company might be. But the State, having agreed that the company should not be compelled to reduce the tolls so that a dividend of fifteen per cent. could not be made, was obliged, if she regulated the tolls at all, to fix rates which would yield *at least* fifteen per cent., and which might, and probably would, yield *more*. It was this surplus, if any, that was to go to the common schools.

In the former case in the Superior Court of Marion County the court in its opinion thus analyzed section 23:

1. It gives the legislature the power to "so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed."

2. It defines the time when such legislative action may be taken, not by fixing a certain day or year in the calendar, but it is to be "when the aggregate amount of dividends declared shall amount to the full sum invested, and ten per centum per annum thereon."

3. The legislative power is checked so that "the corporation shall not be compelled by law to reduce their tolls and profits so that a dividend of fifteen per centum per annum can not be made."

4. Conceiving that it might be impossible to make a tariff of tolls and freights that would yield a profit of fifteen per centum per annum, neither more nor less, we have the provision that "the surplus profits, if any, after paying the expenses and reserving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools."

The charter did not require the corporation of its own motion at any time to fix its tolls so that not more than fifteen per centum should be earned; it simply reserved to the legislature the power to do so, and provided that if the legislature should exercise the power so reserved, subsequent dividends to the stockholders were to be limited to fifteen per cent. per annum, and the surplus profits, if any, were to go to the common schools.

The last clause of section 23 was intended to enable the legislature to act intelligently in regulating the tolls and freights, by making it the duty of the corporation to furnish the legislature, if required, with a statement of the expenditures and profits.

If the legislature had meant to declare, as the plaintiff contends, that the surplus profits over fifteen per cent. should be paid to the State whenever the aggregate amount of dividends declared had reached the full sum invested, and ten per cent. per annum thereon, section 23 would have been framed as follows:

"When the aggregate amount of dividends declared shall amount to the full sum invested and ten per cent. per annum thereon, not more than fifteen per cent. per annum shall there-

after be divided on the capital employed, and the surplus profits, if any, after reserving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state for the use of the common schools."

In granting to the company authority to fix its tolls and freights, the State did not surrender its right to require that they should be reasonable. No surrender of sovereignty is to be implied. The grant was simply of authority to charge reasonable tolls and freights. Stone vs. Illinois Central R. R. Co., 116 U. S. 347. Pennsylvania Co. vs. Miller, 132 U. S. 75. Covington Turnpike Co. vs. Sandford, 164 U. S. 578. Covington vs. Kentucky, 173 U. S. 231. City of Indianapolis vs. Navin, 151 Ind. 139.

Section 24 did not require that dividends should be made of all the profits. They were to be made of only so much of the profits as the corporation might deem expedient, and the directors were authorized to retain such proportion of the profits, as a contingent fund, to meet subsequent expenses, as they might deem proper. The unlimited discretion in declaring dividends, thus conferred upon the directors, is not subject to judicial revision, except for fraud. New York, etc., R. R. Co. vs. Nickals, 119 U. S. 296. Gibbons vs. Mahon, 136 U. S. 549. Beveridge vs. New York, etc., R. R. Co., 112 N. Y. 1. In re Kernochan, 104 N. Y. 618. State of Maryland vs. Baltimore, etc., R. R. Co., 6 Gill 363. Williams vs. Western Union Tel. Co., 93 N. Y. 162. Ely vs. Sprague, 1 Clark's Ch. 351. Smith vs. Pratville Mfg. Co., 29 Ala. 503. Cook on Corporations, 5th ed. Vol. 2, sections 684 and 545.

In section 23 the State expressly surrenders its power to regulate tolls, to a certain extent, for it is stipulated that "the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made." This is plain and the balance of the section is equally plain. Its provisions in effect are that when the aggregate amount of dividends declared by the directors, in the honest exercise of their discretion, have amounted to the full sum invested and ten per centum per annum thereon, the leg-

islature may then interfere to prevent the tolls and freights from being excessive, *and in order to make the legislative regulation of tolls and freights effective, and as a part of such regulation,* the profits of the company, *after such regulation,* are limited to fifteen per centum per annum on the capital employed, and a reserve necessary for future contingencies. If the profits, *subsequent to legislative regulation,* exceed a sum sufficient to permit the division of fifteen per centum per annum on the capital employed, and to provide a necessary reserve for future contingencies, such excess must be paid over to the treasurer of state for the use of common schools.

We invoke a familiar rule of construction, which is thus expressed by this court.

"Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction." Thornley vs. United States, 113 U. S. 310, 313.

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." Hadden vs. The Collector, 5 Wall. 107, 111.

"The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of words they have used." 1 Greenleaf on Evidence, Sec. 277.

It is said by counsel that the contract must be construed strictly against the defendant, and cases are cited to the point that grants of corporate power, or of immunity from taxation, or from police regulation, are to be strictly construed. That

is a well known and salutary doctrine, but it has no application to the present case. The company is not charged with usurping a corporate franchise. It is sued for money, and the problem is to ascertain upon what contingency it agreed to pay a portion of its surplus profits to the State. Was it whenever the aggregate amount of its dividends declared should amount to the full sum invested, and ten per cent. per annum thereon, or was it only in the event that the legislature should thereafter limit its profits to fifteen per cent. per annum, and regulate its tolls for that purpose? That question, which involves the construction of the contract, is to be answered by turning to the contract itself, which is not to be construed in favor of either party, but fairly, for the purpose of ascertaining from the words used what was intended.

No strained construction is to be adopted, simply because the State is a party. In Tennessee vs. Whitworth, 117 U. S. 129, 137, Chief Justice Waite said:

"In construing statutes which are binding on States as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them, which, taking the whole of the statute together, it is apparent the parties intended they should have."

VII.

The thing adjudged by the judgment of the Superior Court of Marion county in 1876 was that the Company was not liable to account for surplus earnings, in the absence of legislation regulating its tolls.

This is conclusively shown by the opinion which the court filed on overruling the State's demurrer to the complaint and in entering judgment in favor of the company (Rec. 607), and is confirmed by the report of the attorney general to the governor, in which he states that that was the question which was

fully and fairly discussed at the bar, and decided by the court. Rec. 623.

The answer of the Supreme Court of Indiana to the plea of the judgment of 1876 is that the State had no cause of action at that time, with or without demand. The court does not say that the opinion of the Superior Court of Marion County in the former case, may not be examined to ascertain what was decided; it rejects the claim that the decision was or could be on the merits, with the statement that "there can be no merits where there exists no cause of action." Rec. 672.

Speaking of the agreement between the company and the State under which the former suit was brought, the court says:

"The agreement was to submit the validity of the State's claim upon the facts as they existed at the time, not as they would be after more profits were received, and after a demand for an accounting had been refused." Rec. 672.

The reference to "the facts as they existed at that time," is evidently to the facts minus the legislation of 1897, for that is the only subsequent fact affecting the rights of the parties. What is intended by the reference to the facts "as they would be after more profits were received," we do not know, since it has never been claimed that the State had any interest in the profits earned after January 17, 1873.

The defense of the prior adjudication was duly set up in the third paragraph of the answer, which sets forth the judgment and proceedings and alleges "that the matters adjudicated in said cause were and are one and the same with those mentioned in the complaint herein, and that said judgment of March 9, 1876, was a full, final and complete settlement of all matters connected with or in any way referring to any and all claims of the State of Indiana against this defendant for the payment by defendant of any portion of its profits to the treasurer of state, for the use of the common schools of the State of Indiana, under the said act of January 26, 1847, and the acts amendatory thereof, and of all matters connected with or in any way referring to the claims of the State of Indiana for an accounting with or the

payment by this defendant to said State of Indiana, for the use of its common schools, of any portion of the profits or earnings of defendant under the terms of said original charter, or of the acts amendatory thereof." Rec. 49, 50. This form of pleading prior adjudication was approved in Wilson vs. Vance, Admr., 55 Ind. 584.

As early as 1825 the Supreme Court of Indiana thus stated the rule with respect to prior adjudications:

"Whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails with very few exceptions throughout the civilized world." Fischli vs. Fischli, 1 Blackf. 360.

Counsel for the State propose to limit the doctrine to the adjudication of issues of fact. To a similar suggestion the Superior Court of New York more than fifty years ago, in a case of great importance made the following answer:

"Judgments turning exclusively upon questions of law form a very large proportion of all that are rendered in contested suits. If these are to constitute an exception to the general rule, the common law doctrine of estoppel will be robbed of its principal value, and a wide inlet be opened to all those mischiefs of interminable and oppressive litigation which it was designed to prevent." Birckhead vs. Brown, 5 Sandf. 134, at p. 149, cited in Bougher vs. Scobey, 21 Ind. 365, at p. 369.

In Tioga Railroad vs. Blossburg & Corning Railroad, 20 Wall. 137, this court held that the construction put upon a written contract in a suit between the parties thereto, was forever binding upon them, and that the judgment concluded the question of the meaning of the contract, in any subsequent suit.

In New Orleans vs. Citizens' Bank, 167 U. S. 371, 396, Mr. Justice White said:

"In Bank vs. Beverley, 1 How. 134, 139, it was held that a construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In Tioga

Railroad vs. Blossburg & Corning Railroad, 20 Wall. 137 and Mason Lumber Co. vs. Buchtel, 101 U. S. 638, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes."

The construction of a will or a written contract presents only a question of law. We must therefore regard the foregoing authorities as establishing the rule that the adjudication of a question of law is no less binding than the determination of an issue of fact. Such also is the effect of the rule recognized by the Supreme Court of Indiana in Thomas vs. Merry, 113 Ind. 83, and in Nickless vs. Pearson, 126 Ind. 477, 486, that an adjudication upon a demurrer to a complaint "is as conclusive and binding upon the parties and operates as res judicata, the same as a judgment rendered upon issues joined and trial by the court or jury."

Another rule equally well settled is thus stated by the Supreme Court of Maine, in Walker vs. Chase, 53 Me. 258, at pages 260, 261:

"The fact that a question has once been litigated can sometimes but not always, be proved by the record. If the fact that a question has been once before litigated can be shown by the record of a court of competent jurisdiction, the former judgment may be pleaded by way of estoppel, or given in evidence under the general issue. Whichever course is adopted, the result will be the same. The parties will be precluded from again litigating the same question.

"If the fact that the same question has been once before litigated can not be shown by the record, the law is now well settled that it may be proved by evidence aliunde, and when thus proved, the result is still the same. In such case, the party sought to be affected by the previous litigation may contest the fact that the same question was then tried; but this fact being established, the result will be all the same, whatever the manner of establishing it may be. It is the fact that the same point has been once tried, and not the manner of proving it, that precludes the parties from again contesting it. The mode of proving it can not affect the quality or legal effect of a fact."

In Russell vs. Place, 94 U. S. 606, 608, Mr. Justice Field thus states the rule:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In Washington Gas Co. vs. District of Columbia, 161 U. S. 316, 329, Mr. Justice White said:

"The elementary rule is that for the purpose of ascertaining the subject-matter of a controversy, and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined. Russell vs. Place, 94 U. S. 606, 609, 610; Cromwell vs. County of Sac, 94 U. S. 351, 355, 356; Lewis vs. Ocean Navigation & Pier Co. 125 N. Y. 341, 348; Littleton vs. Richardson, 34 N. H. 179, 188; Freeman on Judgments, sec. 273, and authorities there cited."

To the same effect are

Miles vs. Caldwell, 2 Wall. 35, at pages 42, 43, cited in Bottorff vs. Wise, 53 Ind. 32.

Packet Company vs. Sickles, 5 Wall. 580, at page 590.

Doty vs. Brown, 4 N. Y. 71, cited in Campbell vs. Cross, 39 Ind. 155, at p. 159, was a suit against a constable, Brown, for levying on property which the plaintiff, Doty, claimed under a bill of sale from one Sisson. Brown answered that in a former suit between himself and the plaintiff concerning other chattels covered by the same bill of sale judgment had been rendered

in his, Brown's favor, by the justice of the peace, on the ground that the bill of sale was fraudulent. The justice was called as a witness, and testified that he had decided the former case in Brown's favor on the ground that the bill of sale from Sisson to Doty was fraudulent. The court of appeals said (p. 75):

"Parol proof was properly admitted to show what was actually in controversy between the parties before Justice Tracy, and the grounds on which the judgment was rendered."

In Wood vs. Faut, 55 Mich. 185, the defendant relied upon a prior judgment of a justice of the peace in his favor. The plaintiff insisted that the justice had not passed upon the merits of his claim in the former suit, but had dismissed the action upon the ground that it was premature. He called the justice, who was permitted to testify "that he gave judgment for the defendant upon the sole ground that the plaintiff's claim was not due, and that he did not pass upon the merits." The supreme court said:

"The evidence offered, under the circumstances of this case, was proper to show that the merits of the plaintiff's claim were not litigated or passed upon in the former suit."

In Carleton vs. Lombard & Ayers Co. 149 N. Y. 137, plaintiffs bought oil from the defendant, and sold it to third parties, who recovered a judgment against the plaintiffs on the ground that the oil was unmerchantable. The plaintiffs then sued the defendant, and offered in evidence the record in the case in which they had been cast in damages. They offered to prove by parol evidence that the recovery in that suit did not proceed upon the ground of any express warranty, or any other ground than the unmerchantable condition of the oil when delivered to them. The court said (p. 152):

"They were not confined to the record in order to show the point passed upon, but could show by parol proof what questions were actually litigated and decided," citing Doty vs. Brown, 4 N. Y. 71; Russell vs. Place, 94 U. S. 606, and many other cases.

The rule is illustrated by many cases in the Supreme Court

of Indiana. As often as the question has arisen, that court has decided that either party to a prior suit, which is relied upon as an estoppel, may show by parol testimony, if necessary, what was in fact decided.

Hargus vs. Goodman, 12 Ind. 629, was a suit involving the title to real estate. The defendant pleaded a former judgment as an adjudication of the title against the plaintiff. The plaintiff replied that "the court in that case did not receive the evidence of defendant's title in said cause, nor find nor pass upon the legal title of this plaintiff." The court said, at p. 632:

"Whether any matter has been tried between the same parties and decided before is a fact depending in part on parol evidence and partly on the record," and at p. 633:

"The defendant had a right in the present suit to plead that evidence was not heard upon the issue of title, nor did the court find upon that issue. It follows that the demurrer to the reply should have been overruled."

Campbell vs. Cross, 39 Ind. 155, was an action to recover possession of real estate and to quiet plaintiff's title. The defendant answered that in a former suit by the plaintiff against the defendant, the latter was charged with having committed a trespass on the real estate in question, by cutting and carrying away timber, and that the only question litigated in the trial was the title to the real estate, and that judgment was rendered for the defendant. The court held the answer good, saying at p. 159:

"A verdict and judgment for defendant in an action of trespass q. c. f., where he pleads liberum tenementum, do not necessarily in all cases settle the title to be in him. He may plead other matters also, as a denial of the imputed trespass, and the cause may turn on other questions than defendant's title to the property. But parol evidence is competent to show what transpired and what facts were controverted on the former trial, and thus show the ground upon which it was decided," citing Brown vs. Doty, 4 N. Y. 71, and Hargus vs. Goodman, 12 Ind. 629.

Bottorff vs. Wise, 53 Ind. 32, was an action to recover rents and profits of real estate and for timber cut and carried away

and for waste. The defendant pleaded in bar a judgment in a prior action of ejectment brought by the plaintiff in which he claimed damages for the same trespass and waste. The plaintiff replied that on the trial of that action no evidence was offered or heard in relation to damages resulting from waste or trespass, and that the court did not consider or determine any question in reference thereto. The court held that the reply was proper, and that the lower court erred in sustaining a demurrer thereto. The court said, p. 35:

"The presumption is that whatever matters were embraced by the issues were determined, but this presumption is not conclusive. Where a question of former adjudication is relied upon, it is competent for the other party to allege and prove by parol what questions were considered and determined by the court and jury," citing Miles vs. Caldwell, 2 Wall. 35.

Roberts vs. Norris, 67 Ind. 386, was a suit in replevin, in which the defendant pleaded a judgment in his favor in a former suit in replevin brought by the plaintiff against him to recover the same chattels. Plaintiff replied that his former suit was dismissed upon the sole ground that it was brought prematurely before having made a demand, and that the merits were not passed upon. The court held that a demurrer to such a reply was properly overruled, saying, at p. 392:

"As to the admissibility of extrinsic evidence to show upon what ground the former judgment was rendered, and, therefore, its effect, see the cases last above cited; also Angel vs. Hollister, 38 N. Y. 378; Bottorff vs. Wise, 53 Ind. 32."

The Superior Court rejected our offer of the opinion to show that the former judgment in favor of the company was rendered on a consideration of the merits, making the following observations which comprise the whole of the court's opinion on the subject:

"The rule that it may be shown by parol evidence or evidence outside of the record as to the question decided, will not apply when the judgment is based on an order sustaining a demurrer to the complaint. This seems to be an exception to the rule." Rec. 101.

The Supreme Court holds that the evidence would not have changed the result, and was therefore immaterial, because the State had no cause of action at that time, and was properly defeated, for that reason. But, turning to the decision of the Superior Court, why should a judgment based on an order sustaining a demurrer to a complaint be an exception to the general rule? The merits of a controversy may involve nothing but a question of law, as for instance the construction of a will or a contract. Is there no way of concluding such a controversy? Can there be no binding adjudication except where an issue of fact is raised? The appropriate and often times the only way of presenting a controversy which involves the construction of a will or contract is by demurrer to a complaint setting up the instrument. That raises the question, and if the court, having examined and construed the contract, sustains the demurrer and dismisses the complaint upon the ground that the contract properly construed does not impose any obligation upon the defendant in favor of the plaintiff, is that adjudication to go for nought and the plaintiff to be at liberty to renew the contention as often as he pleases?

Of course if the former judgment was on some technical ground, such as a wrong venue, or misjoinder of parties, or because the suit was prematurely brought, and that is made to appear, the judgment ought not to conclude the plaintiff. But if the judgment was on the merits, and that is shown, the plaintiff ought to be, and is barred, and it is immaterial whether the merits involved an issue of fact or a question of law.

We concede that the burden rests upon the party who pleads a former judgment to show that it was rendered upon a consideration of the merits. That is what we undertook to do by producing the written opinion filed by the court in sustaining the demurrer to the former complaint, the highest and most reliable form of parol evidence, to show that the demurrer was sustained upon a consideration of the merits, and not for want of an allegation of demand or for any other technical defect, and that the judgment in favor of the defendant was rendered

upon the ground that its charter did not require it to account for its surplus profits in the absence of legislation regulating its tolls. After an elaborate consideration of various sections of the charter, the conclusion of the court is thus stated in that opinion:

"In view, therefore, of the construction placed upon the different sections, we conclude that the State can not call upon the defendant to pay the surplus earnings over to the State as a part of the school fund, without having previously legislated by regulating the amount of tolls and freights."

The opinion closes with the statement that "the demurrer will *therefore* be sustained to each paragraph of the complaint." Rec. 616, 617.

The ground of the former judgment is also shown by the report of the decision made by the attorney general to the governor, in which he says:

"After full argument before the full bench of three judges of said court and presentation of printed briefs, the court decided against the State, mainly upon the ground that, under the provisions of the special charter to the company, legislation regulating the tolls and freights of the company was a pre-requisite to any recovery for the State." Rec. 623.

If a justice of the peace may testify to the ground upon which he decided a case, surely the written opinion of a court may be received in evidence, to show the ground upon which a demurrer to a complaint was sustained, and therefore the ground upon which judgment was rendered for the defendant.

We did not offer the opinion in evidence to show the process of reasoning by which the court in the former case reached its conclusion; but to show the conclusion itself, in order that it might appear that the demurrer was not sustained, and that the action was not dismissed, on the ground that the suit was premature, or for any other technical defect, but upon the ground that the State, on a proper construction of defendant's charter, was not entitled to a share of its surplus profits, in the absence of legislation regulating its tolls. And we submit that that construction thus put upon the charter in a suit, in which the point

was drawn in question and decided, forever concludes the parties.

No case has been produced by counsel for the State in support of the view that a judgment on demurrer is an exception to the general rule that the point actually decided in a prior suit may be established by parol testimony, if necessary.

Birckhead vs. Brown, 5 Sandf. 134 (N. Y. Superior Ct.), was a case of great importance argued by the leaders of the New York bar. It was a suit to charge the defendant upon a contract, under which the plaintiff claimed that the defendant agreed to accept certain drafts. The defendant offered in evidence the record of a former suit brought against him by the plaintiff, upon the same contract, to recover for the defendant's failure to accept other drafts, in which judgment was rendered for the defendant. The record did not disclose upon what ground the court had decided in the defendant's favor, but he offered the opinion of the judges to show that their decision was on the ground that the contract, properly construed, did not require him to accept the drafts. The court said, at p. 151:

"In our opinion, extrinsic proof may, with the same propriety, be admitted to explain the judgment of the court, as the verdict of the jury, and the reasons given by the court upon the delivery of the judgment furnish the necessary evidence."

That was not a judgment on a demurrer; it was a judgment on a special verdict, which, as the court points out, is the same thing as a judgment on a demurrer, because it is the court's conclusion of law on facts established by a special verdict, while a judgment on demurrer is the court's conclusion of law on the facts alleged, and admitted by the demurrer. The whole of the opinion of the court on the subject is as follows, at pages 150, 151:

"It must be admitted that several and distinct questions of law, questions affecting as well the validity of a defence as the right of the plaintiff to recover, may arise upon a special verdict, and in such cases it can not be ascertained from the record alone upon what grounds the judgment proceeded. In other words, what were the precise questions that the court

meant to determine. But when the plaintiff demurs to a special plea, and judgment is given for the defendant, there is the same difficulty, since it can not then be known from the record alone, whether the judgment was founded upon the sufficiency of the plea, or the insufficiency of the declaration. The reply to the objection is the same in both cases. In this State the law was settled by the decision of the Court of Error, in Wood vs. Jackson, 8 Wend. 1-49, 18 Wend. 107, that when the record fails to disclose the grounds of the judgment, parol evidence, to show what were the questions raised upon the trial and passed upon by the jury, may be admitted, and the effect of the judgment, as an estoppel, be thus established. In our opinion, extrinsic proof may, with the same propriety, be admitted to explain the judgment of the court, as the verdict of the jury, and the reasons given by the court upon the delivery of the judgment, furnish the necessary evidence."

Spicer vs. United States, 5 Court of Claims, 34, was an action for breach of the defendants' contract to receive and pay for certain horses. The defendants pleaded a judgment in their favor in a former suit brought by the plaintiff on the same cause of action. The following statement is taken from the report at p. 36: "In the former case, judgment went against the claimant on demurrer to his petition. The defendants now plead that judgment in bar. The claimant objects and shows by the opinion of the court that his former petition was in fact dismissed for a defect, now remedied, in not stating that he owned and tendered certain horses which the defendants agreed to receive."

The court said, at p. 50:

"If it were necessary to pursue the subject further, I should say that the principle now established by the Supreme Court, that parol evidence is admissible to show that what properly might have been decided under the pleadings was in fact passed upon at the trial, is applicable to decisions on demurrer so far as to warrant us in looking into the opinion rendered. In this case that opinion shows that the former decision went upon the precise objection taken by the defendants, 'that the claimant never delivered, or offered to deliver, any portion of the horses which he contracted to furnish;' or, as the opinion states it, 'none of the horses were ever offered for acceptance.' "

In Kleinschmidt vs. Binzel, 14 Mont. 31, it was held that a judgment for the defendant in a former suit, based upon a demurrer to the declaration, the demurrer covering objections to form as well as to the merits, was not a bar to the subsequent suit, "it not having been shown that such judgment proceeded upon a consideration of the merits," p. 61. The court was evidently of opinion that if the defendant had shown by parol testimony that the demurrer in the former suit was sustained upon a consideration of the merits, the judgment thereon would have been a bar. The following is the syllabus:

"Where a demurrer has been interposed to a complaint upon several grounds, embracing objections to form as well as to the merits, and is sustained generally, and the pleader abides by his pleading, and suffers judgment, such judgment does not estop the same party in another action, between the same parties or their privies, where it neither appears by the record, or by extraneous evidence, that the demurrer in the former suit was sustained on consideration of the merits; and, in the absence of such showing, it will be presumed to have been sustained for defects of form rather than upon each of the several grounds alleged."

These cases, we submit, warrant the conclusion that a judgment on demurrer is no exception to the rule which permits resort to parol testimony, in the interest of truth and justice, to show what was really decided in a prior suit.

Since "it is the fact that the same point has been once tried, and not the manner of proving it, that precludes the parties from again contesting it" (to use the language of the Supreme Court of Maine, in Walker vs. Chase, 53 Me. 258) and since the purpose of allowing parol testimony is to establish the very truth and ascertain what point was in fact decided in the prior suit, there would seem to be no good reason why parol testimony should not be received to show upon what ground a demurrer, that might have been sustained on more than one ground, was in fact sustained. Otherwise, when the order sustaining the demurrer is followed by a judgment, the parties may be deprived of the benefit of the thing adjudged and be

obliged to contest it again, as if it had never been argued and considered and judicially determined.

But it is said that, if the former suit of the State was premature for want of a demand, the court had no right to decide any other question. But the court had jurisdiction of the parties, and the right to determine what questions were before it for decision, and whether a demand was necessary. Its determination that the question of the construction of the charter was properly before it for decision, and its decision thereof, even if erroneous, must stand. It can not be attacked collaterally but only by appeal. Its decision on the merits involved a decision that no demand was necessary. Moreover, the defendant could waive demand, if one were necessary, and submit to the determination of the merits, as in fact it had agreed to do by the written contract with the State, under which it had bound itself to submit the question of its liability under its charter to the decision of the Superior Court of Marion County, and to enter its appearance to a suit to be instituted by the State in that court for that purpose.

"A request for the payment of a debt is immaterial unless the parties to the contract have stipulated that it shall be made; if they have not the law requires no notice or request, but the debtor is bound to find out the creditor and pay him the debt when due." Parke B. on Walton vs. Mascall, 13 M. & W. 452, 458.

"As a general rule money due may be sued for without any previous demand therefor." School Town of Princeton vs. Gebhart, 61 Ind. 187, 191.

A note payable on demand may be sued for without demand.

"In assumpsit for money had and received where the complaint alleges the receipt of money by defendant to the use and benefit of plaintiff, it need not allege a demand." Field vs. Brown, 146 Ind. 293 (Syllabus).

In Vyse vs. Wakefield, 6 M. & W. 442, 452, Baron Abinger stated the general rule to be "that where a party stipulates to

do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled."

Numerous cases illustrating these rules may be found in Leake on Contracts (3d ed.) 559-561, and in Harriman on Contracts (2d ed.) chap. 13, pages 170 and 171.

The following rule stated by Chitty in his work on Contracts (11th ed.) 1071, is quoted in several cases in courts of last resort:

"Unless there be an express stipulation in the contract, or it be requisite from the peculiar nature thereof that a request or demand of performance shall be made, such request or demand is not essential to complete the cause of action, but the party is bound to perform his contract without being required so to do."

The former suit was brought nearly two years after the defendant had surrendered its charter. If the defendant had made surplus profits in 1870 and in 1871 and 1872, which belonged to the State, they should certainly have been paid before 1875, and the suit instituted in that year was not premature.

The State must accept the alternative, that the prior adjudication is a bar to the present suit, or that a cause of action has been created, since 1876, by retroactive and unconstitutional legislation.

VIII.

The judgment under review destroys the vested right of the company under the judgment of 1876 in its favor, and takes its property without due process of law.

We recognize the rule that the failure of the court of a State to give effect to a prior judgment of a court of the same State, does not ordinarily present a federal question; but where, after the surrender of a charter, it has been adjudicated between the State and the corporation that the latter is not liable to the State under the charter, and in the face of such surrender and adjudication, the State passes, and its courts enforce, legislation providing for a new suit in its own favor on the old claim, and the courts of the State decline to give effect to the prior adjudication, we have a case in which property of the company has been taken by the State without due process of law, through the instrumentality of its legislative, executive and judicial departments, acting jointly and severally. The provisions of the Fourteenth Amendment refer to all the instrumentalities of the State, including its legislative, executive and judicial authorities. C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226.

The judgment of a court of law creates a vested right, of which the owner may not be deprived by any agency of the State, except by due process of law. A revision of the judgment although by a proceeding judicial in form, may not be due process of law. This has been held in many cases of appeals or new trials authorized by statutes, passed after the judgment has become final.

In Atkinson vs. Dunlap, 50 Maine, 111, 115, the court said:

"Judgments may be subject to be revised according to laws existing at the time of their rendition. This is a fixed and settled qualification of rights vested under them. But with this exception, there can be no higher title to any right or interest whatever, than what arises from a regular judgment of law."

In Davis vs. Menasha, 21 Wis. 497, 502, the court held that a statute granting a right to review a judgment, where none

existed at the time the judgment was rendered, was unconstitutional, saying:

"So that this enactment so far as this cause is concerned must be held invalid; both because it attempts to destroy vested rights, and also because it is an exercise of power on the part of the legislature which belongs to the courts."

In Town of Lancaster vs. Barr, 25 Wis. 560, 562, the court said:

"The policy of the law or constitutional principle involved very clearly is, that rights of property once vested, or liability or want of liability once established, by judicial decision then final between the parties, shall not afterward be disturbed, or the controversy opened, by mere legislative enactment."

In Beaupre vs. Hoerr, 13 Minn. 366, 367, the court said:

"The judgment in the case at bar was the property of the defendant, and, as the absolute owner of it, his right thereto and therein was a vested right, and of the highest nature, being established by the sentence of a court of jurisdiction; a sentence in this case not subject to be set aside under the laws in force at the time when his right became consummated and perfect. Now can the legislature pass a valid act by which after the time for appeal has expired under existing law, he may be divested of his right either by permitting the debtor to appeal, and thereby changing a judgment absolute to a judgment nisi, or by authorizing an appellate court to disregard his fixed and vested right in his judgment, and re-examine the case just as if his right had never become fixed and vested? If the legislature can do this by a law passed six days after the lapse of the time allowed for appeal, can any reason be given why it may not be done six years, or six hundred years after the lapse of such time?"

In Germania Savings Bank vs. Suspension Bridge, 159 N. Y. 362, 368, the court said:

"If, however, according to the law existing when the statute extending the time to appeal, or granting a new right of appeal, was passed, the judgment had become final and unalterable, because no further right of appeal existed, then the judgment conferred a vested right and was property of which the owner could not be deprived by an act of the legislature, or otherwise than

through due process of law. An appeal brought pursuant to a statute which authorizes an appeal after the time provided by law had expired, or authorizes a further appeal after the only appeal authorized by law had been brought and finally decided, although it might result in the reversal of the judgment and be in form a judicial proceeding, would not be what is known as due process of law, which is not satisfied by a judgment based upon an unconstitutional statute.

"A judgment is a contract which is subject to interference by the courts so long as the right of appeal therefrom exists, but when the time within which an appeal may be brought has expired, it ripens into an unchangeable contract and becomes property, which can be disposed of or affected only by the act of the owner, or through the power of eminent domain. It is, then, beyond the reach of legislation affecting the remedy, because it has become an absolute right which can not be impaired by statute."

The cases are numerous and uniform in which it has been held that statutes providing for appeals from judgments which were final when rendered, are void because amounting to an impairment of vested interests, without due process of law.

Gompf vs. Wolfinger, 67 Ohio St. 144, 152.
McCabe vs. Emerson, 18 Penn. St. 111.
Griffin's Executors vs. Cunningham, 20 Grat. 31.
Wieland vs. Schillock, 24 Minn. 345.
Dorsey vs. Dorsey, 37 Maryland, 64, 74.

In Memphis vs. U. S., 97 U. S. 293, a creditor of the city of Memphis who had recovered a judgment against the city, commenced a proceeding in mandamus to compel the levy of a tax for the payment of the judgment and secured an alternative writ. On the next day after securing the writ the legislature passed an act repealing the law under which the mandamus proceeding was commenced. This court held the law unconstitutional. Mr. Justice Strong said:

"But before that day [on which the repealing act was passed] we think the relator had acquired a vested right by his judgment and his alternative writ of mandamus to have a tax levied sufficient to pay the debt due to him from the city, a right of which he could be deprived by no subsequent action of the legislature." 97 U. S. 297.

If a statute providing for the review of a judgment by appeal, where no right of review existed when the judgment was rendered, is in excess of the legislative power, surely a statute of a State authorizing and directing a new suit in its own favor, to assert a right which has already been adjudicated against it, is unconstitutional.

We submit that the act of January 27, requiring the company to account for past earnings, and the act of March 4, appropriating them to the use of the State and directing the attorney general to sue for them, impair the vested rights of the company under the judgment of 1876, and that the proceedings in this case, being taken under and by virtue of those statutes alont, are not due process of law. Proceedings which are authorized by, and depend wholly upon, an unconstitutional law, although judicial in form, are not due process of law, and so the cases we have cited, declare.

IX.

The judgment gives effect to the legislation of 1897, not only in permitting a recovery, but in fixing the amount.

Section 23 of the original charter requires an account of dividends declared. The amendment of February 24, 1897, and the act of March 4, 1897, require an account of net earnings. The court in fixing the amount of the recovery, has adopted the directions of these two acts of 1897, thereby giving effect to them. If the account had been taken on the basis of dividends declared, as fixed by the original charter, and not on the basis of net earnings, as prescribed by the legislation of 1897, the result would have been quite different.

The computation by which the Superior Court arrived at the amount of the judgment is found at page 103 of the record, and is summarized as follows:

Investment	$1,216,690.05
Ten per cent. per annum thereon	1,830,943.31
Investment and ten per cent.	$3,047,633.36
Dividends declared	3,108,602.68
Excess of dividends over investment and ten per cent. thereon	$60,969.32
Net earnings for the year 1870	278,720.54
" " " " " 1871	336,988.96
" " " " " 1872 to Nov. 30	296,589.00
" " from Nov. 30, 1872, to January 17, 1873	103,403.26
Balance of surplus profits as of December 31, 1869	230,201.24
Total	$1,306,872.32
Deduct fifteen per cent. on investment ($1,216,690.05) from January 1, 1870, to January 17, 1873	556,128.88
Balance due State January 17, 1873	$750,743.44
Interest thereon from March 13, 1897, the date on which the demand was made, to the date of the judgment	163,161.57
Amount of judgment	$913,905.01

The court arrived at the item of $230,201.24, in the foregoing calculation, by deducting from the surplus on hand December 31, 1869 ($1,049,365.03) the moneys expended by the company after 1868, for betterments, equipment and the extension of its road from Terre Haute west to the Illinois State line, amounting to $819,163.79. (Rec. 99.)

It therefore appears that the court charged the company with this surplus of $239,201.25 (which was not dividends declared) and with the net earnings from January 1, 1870, to January 17, 1873, and with the amount ($60,969.32) by which the dividends declared up to December 31, 1869, exceeded the investment and ten per cent. thereon. It deducted from the total sum fifteen per cent. on the sum in-

vested from January 1, 1870, to January 17, 1873. In other words, the company was charged, not with the dividends declared, as provided in section 23 of the original charter, but with the total net earnings from the beginning, less the sum of $819,163.79 expended as aforesaid, subsequent to 1868 for betterments, equipment, and extension of the road from Terre Haute to the Illinois state line.

The calculation suggested by the Supreme Court, at pages 680-681 of the record also charges the company with net earnings from the beginning. It charges it with $193,104 excess of dividends December 31, 1871, and with $138,552 on account of net earnings of 1870 and 1871, in excess of dividends declared, and with the total net earnings of 1872 ($296,589), and with $185,510 plus $448,959 (or $634,469) on account of balance of surplus earnings on hand December 31, 1869.

Both calculations charge the company with the net earnings from the beginning of its operations, for they charge it with all the dividends declared up to January 17, 1873, and with the balance of its net earnings not declared in dividends, less certain arbitrary deductions.

It appears clearly, therefore, that the judgment under review gives effect to the legislation of 1897, not only in so far as it creates an obligation on the part of the company, but in determining the amount of the liability, there being no basis for the recovery adopted by the court, except as found in the act of February 24, 1897, amending section 23 of the charter, and in the act of March 4, 1897, directing this suit to be instituted, and declaring the method of taking the account.

It must be remembered that both the master and the court found that the directors had been guilty of no fraud, and that the dividends actually declared must therefore be treated as the dividends provided for by section 23 of the original charter. Section 24 gave the directors the largest discretion in the declaration of dividends, requiring a distribution only "of so much of the profits as the corporation may deem expedient," and authorizing the board to "retain such proportion of the profits as a contingent fund to meet subsequent expenses, as they

shall deem proper." The rule is well settled that under such a charter, the discretion of the board of directors in determining the dividends to be declared, the occasion for a surplus fund, and the amount of such fund, is not subject to judicial revision in the absence of fraud.

2 Cook on Corporations, sections 545, 684;
State of Maryland vs. B. & O. R. R. Co. 6 Gill. 363;
New York, etc., R. R. Co. vs. Nickals, 119 U. S. 296;
Gibbons vs. Mahon, 136 U. S. 549;
Williams vs. Western Union Tel. Co., 93 N. Y. 162;
In re Kernochan, 104 N. Y. 618;
Beveridge vs. Elevated R. R. Co., 112 N. Y. 1;
Smith vs. Prattville, etc., Co., 29 Ala. 503;
Ely vs. Sprague, 1 Clark's Chan. 351.

The outstanding shares of the capital stock of the company amount to $1,988,150, which represents the actual cost of the road between Terre Haute & Indianapolis. It does not include the cost of the extension from Terre Haute west to the Illinois state line, which was built after 1868 with the proceeds of bonds. In estimating the "full sum invested," which, with 10 per cent. per annum thereon, was first to be paid back, the court refused to allow the cost of the construction of the road, but only the amount paid in cash for stock by original subscribers. It cut out two stock dividends amounting to $588,300, which represented earnings, not drawn out but actually put into construction as accretions to capital, for which stock was issued in 1856 and 1864, and sundry other stock lawfully issued. In fixing the sum invested in stock by stockholders at $1,216,690.-05 the court excluded, among other items, the following stock:

(1) Stock issued to stockholders as a stock dividend in November, 1856, $211,600.

(2) Stock issued to stockholders as a stock dividend in April, 1864, $376,700.

(3) Stock issued to John Rose for services August, 1852, $10,000.

(4) Stock issued to C. Rose, extra allowance, April, 1853, $6,000.

(5) Stock issued on interest certificates for interest allowed on advanced payments, $28,746.02.

The court also deducted from the par value of the stock issued the following amounts for discount on bonds sold:

(1) Discount on $45,100 six per cent. bonds surrendered for stock at par, $6,264.18.

(2) Discount on $545,000 seven per cent. bonds surrendered for stock at par, $58,796.42.

If the court, in taking the account, had included, as part of "the full sum invested," the earnings which the stockholders permitted to remain in the company and to be applied to construction, for which stock dividends were issued to them, nothing would have been found due to the State, even if, on the other side of the account, the stock dividends had been included in and considered as part of the dividends declared.

In stating the dividends declared, the Superior Court treated the internal revenue tax on dividends amounting to $117,137.48, paid by the company to the United States, as part of the "dividends declared" (Rec. 98) in disregard of the decisions of this court construing the federal statute, which regards the tax as a debt due from the Company. Railroad Co. vs. Collector, 100 U. S. 595; United States vs. Erie Railway Co. 106 U. S. 327; Bailey vs. Railroad Co. 106 U. S. 109; Memphis, etc., R. R. Co. vs. United States, 108 U. S. 228.

CONCLUSION.

Each of the four statutes of the State of Indiana passed in 1897, and challenged in this case, is clearly unconstitutional. The act of January 27, without constitutional right, and in pursuance only of the pretended authority of a charter which had been surrendered twenty-four years before, required the company to account to the State for its earnings and private property, commencing fifty years back. The act of February 18 declared the contract of surrender, made twenty-four years before, to be inoperative. The act of February 24 undertook to amend a charter, which never was subject to amendment, and which moreover had been surrendered twenty-four years be-

fore, by imposing new and different obligations and declaring that the liability of the company should "be the same as though this amendment had been originally a part of the charter of said railroad, and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the State." The act of March 4 appropriated the company's private property to the use of the State, and directed the attorney general to sue for its recovery.

Counsel can not defend this legislation. The only answer they make, is that the Supreme Court of Indiana has not given effect to it; which is the more remarkable, in view of the relator's message to the general assembly, in submitting the draft of the first act, in which he said that the former judgment was an adjudication and a bar to any further action unless the general assembly should "by antecedent legislation make a case different from the one presented then," and that "nothing could be done" without "the much needed legislation," which he urged. The state court has given effect to the legislation, not as providing a remedy for a pre-existing cause of action, but as creating a cause of action, which did not exist before the statutes were passed, and which would not exist to-day, as the Supreme Court of Indiana expressly declares, if they had not been passed.

We submit that the judgment of 1876 is a bar to the present suit, and that the vested rights of the company thereunder are destroyed without due process of law, as the result of the unconstitutional legislation of 1897, and of the proceedings of the State thereunder, in this case; or, that a cause of action has been created since the date of that judgment, by retroactive and unconstitutional legislation. The State must accept one or the other of these alternatives, and either requires that the judgment under review should be reversed.

Respectfully submitted,

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THE LEGISLATION OF 1897.

Acts of 1897, page 8, chapter viii.

An Act to require the Terre Haute & Richmond Railroad Company, and the Terre Haute and Indianapolis Railroad Company, pursuant to the provisions of section twenty-three (23) of an act entitled "An act to incorporate the Terre Haute and Richmond Railroad Company," approved January 26, 1847, to furnish the legislature with a correct statement of the amount of expenditures and the amount of profits, after deducting all expenses of the Terre Haute and Richmond Railroad Company and the Terre Haute and Indianapolis Railroad Company from the 26th day of January, 1847, to the 17th day of January, 1873, and declaring an emergency.

[Approved January 27, 1897.]

Whereas, By section twenty-three (23) of an act of the general assembly of the state of Indiana, entitled "An act to incorporate the Terre Haute & Richmond Railroad Company," approved January 26, 1847, it is provided among other things, that the surplus profits of said road in certain contingencies shall be paid over to the treasurer of the state for the use of the common schools, and that it shall be the duty of said corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same; and

Whereas, It has been made known to this general assembly that a large amount of money is due to the state of Indiana for the use of the common schools under this section, but the particular amount thereof is not known, and it is necessary that such statement shall be made in order that this general assembly may be advised of what legislation is needed in order to enforce the rights of the state; and

Whereas, The books and papers of said railroad company are now in the possession of the Terre Haute & Indianapolis Railroad Company; now therefore,

Section 1. Be it enacted by the general assembly of the State of Indiana, That the Terre Haute & Richmond Railroad Company and the Terre Haute and Indianapolis Railroad Company

be and they are hereby required to make and file with the attorney general of this State for the use of the general assembly, on or before the 6th day of February, 1897, a statement under the oath of the president and secretary of said roads showing:

1. The amount of expenditures in the construction and operation of said roads from the 26th day of January, 1847, to the 17th day of January, 1873, inclusive.

2. The total amount of receipts during the corresponding period.

3. The total amount of profits in the operation of said roads during said period.

4. The detail of the expenditures:
   a. In the construction of said road.
   b. In the operation thereof during the corresponding period.

5. What disposition has been made of the profits:
   a. By way of dividends declared and paid from time to time.
   b. By way of reinvestments or other disposition.

Sec. 2. The attorney general of the State do immediately upon the passage of this bill cause notice thereof to be served upon the president or secretary or some member of the board of directors of the said Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company, by personal notice if such officers or directors or either of them can be found within the state of Indiana, and in the event that neither or any of them can be found within the state of Indiana, by publication in a daily newspaper of general circulation printed and published in the cities of Indianapolis and Terre Haute, by three consecutive publications, and demand of said companies the making and furnishing of said statement.

Sec. 3. Immediately following the 6th day of February, 1897, or sooner in the event such statement is filed with him, the attorney general shall report to this general assembly such statement, and in the event such statement is not filed with him, to report that fact, together with the steps that have been taken by him to notify said companies of the passage of this law.

Sec. 4. Whereas, an emergency exists for the immediate taking effect of this law, the same shall be in force from and after its passage.

Acts of 1897, p. 38, chapter xxxvii.

An Act to amend section thirty-six of an act entitled "An act to provide for the incorporation of railroad companies," approved May 11, 1852, and declaring an emergency.

[Approved February 18, 1897.]

Section 1. Be it enacted by the general assembly of the state of Indiana, that section thirty-six of the above entitled act be amended to read as follows:

Section 36. All existing railroad companies may acquire all the powers or benefits conferred by this act, by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company, and the acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act, and thereupon such company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified, as fully as they would have had and been if organized under this act: Provided, however, that whenever any railroad organized under any special charter granted by the state of Indiana, shall hereafter accept or shall have heretofore accepted the provisions of the general railroad law as embodied in said act, approved May 11, 1852, all rights and liabilities, whether inchoate or complete, in favor of the state of Indiana, shall be and they are hereby expressly reserved to said state notwithstanding such acceptance, and said state may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the general assembly may deem appropriate, and notwithstanding such acceptance any and all provisions of said charter may be amended, repealed or added to as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May 11, 1852.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

Acts of 1897, p. 59, chapter xlvi.

[Approved February 24, 1897.]

An Act to amend section twenty-three of an act entitled "An act to incorporate the Terre Haute and Richmond Railroad Company," approved January 26th, 1847, and declaring an emergency.

Section 1. Be it enacted by the general assembly of the state of Indiana, that section twenty-three (23) of the above entitled act be amended to read as follows:

Section 23. That when the aggregate amount of dividends declared or earned received in excess of the operating expenses of said road shall amount or shall have amounted to the full sum invested in the construction of said road with ten per cent. interest per annum thereon, the general assembly may so regulate the tolls and freights that not more than fifteen per centum per annum upon the amount invested in the construction of said road shall be divided on the capital so invested in such construction, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum upon the actual capital that has been invested in said road shall not be made; and it shall be the duty of the corporation to furnish the general assembly, from time to time, whenever required, with correct statements of the amount of its expenditures, not only in the construction of said road, but also in the operation thereof, and the amount of profits after deducting all operating expenses, which statements shall be made under the oath of the officer, or officers, whose duty it shall be to make the same; and at all times after the aggregate of the dividends declared shall amount, or shall have amounted to the sum used in the construction of said road and ten per centum per annum thereon, the surplus profits after reserving for division, or after making dividends at the rate of fifteen per centum per annum, and after reserving such reasonable proportion as may be necessary to provide for future contingencies shall be semiannually, on the first Monday in July and December of each year, paid over to the treasurer of state for the use of common schools. And the general assembly may, from time to time, as it may deem expedient, take such steps as it may deem necessary to compel said railroad company to comply with the provisions of this section, as herein amended, and to account for and pay over said moneys and said excess of profits to said treasurer of state for the use of said schools, and whenever said general assembly shall require an accounting from said railroad company such accounting shall cover the entire period covered by the operation of said road from its acceptance of its charter up to and including the period when said railroad company may have accepted the provisions of the general railroad law of the state. And the right of the state upon any such inquiry or upon any suit that may be authorized to compel

such accounting shall be the same as though this amendment had been originally a part of the charter of said railroad, and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the state: Provided, however, that nothing in this act contained shall be in any wise construed as lessening, impairing or releasing in any manner any right of or any liability to the state of Indiana by reason of anything contained in said original charter; all of which rights and liabilities are expressly reserved to said state as fully as though this section had not been amended.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

Acts of 1897, p. 145, chapter xcix.

An Act to require the Terre Haute and Indianapolis Railroad Company, its officers, agents and persons in possession thereof to account to the attorney general of the state for the amounts due and owing to the treasurer of state for the use of common schools, by reason of the excess of its receipts over its expenditures under the provisions of its charter appropriating the same to the use of common schools, authorizing a demand for such accounting and suits to enforce the same, the appointment of additional counsel, and providing for the expenses of such litigation and the compensation therefor, creating an auditing board and prescribing its powers, authorizing the attorney general to bid upon any sale of said road and authorizing the payment of such bid, and providing for the operation of said road until the general assembly shall determine in regard to the disposition thereof, and for other purposes, and declaring an emergency.

[Approved March 4, 1897.]

Whereas, on the 26th day of January, 1847, the general assembly of the state of Indiana granted a special charter to the president and directors of the Terre Haute and Richmond Railroad Company, for the purpose of constructing and operating a railroad commencing at some point on the western line of the state of Indiana and running eastwardly through Terre Haute, Greencastle and Indianapolis to the city of Richmond; and,

Whereas, said railroad was constructed from a certain point on the western line of Indiana, eastwardly through Terre Haute, Greencastle to Indianapolis, under the privileges granted by said charter; and,

Whereas, by the terms of an act approved March 6th, 1865, the name of said company was changed to that of the Terre Haute & Indianapolis Railroad Company, and by said act all the contracts, obligations, and liabilities, theretofore existing under the name of the president and directors of the Terre Haute & Richmond Railroad Company were continued in full force, notwithstanding the change in the corporate name; and

Whereas, by the terms and conditions of such charter, said corporation, among other things, was required to pay to the treasurer of the state of Indiana, for the use of its common schools, certain of its surplus profits; and,

Whereas, by the terms and conditions of said charter, it became and was the duty of said company to make and keep complete records of the expense of building and repairing said roads, and each section thereto, together with its incidental expenses, and also an account of the tolls and earnings thereof; and,

Whereas, no sufficient or satisfactory statement or report has been made by said corporation or its successors to the general assembly, or to any officer of the state, of the amount of expenditures or earnings, or of the amount of profits after deducting the expenses, or of the conduct of its business, so as to inform the general assembly upon that subject, notwithstanding a demand therefor has been duly made upon said company and its successors, under the authority and by the direction of the general assembly; and,

Whereas, no moneys have ever been paid by said company to the treasurer of state for the use of the common schools of the state, and it is believed and represented to the general assembly that there is now and has for a long time been due to the treasurer of state, for the use of said common schools, a large sum of money by reason of the excess of earnings over expenses under the terms and provisions of said charter as it originally existed, and as it has been subsequently amended, but it is not possible, except by judicial proceedings, to ascertain and determine the exact amount thereof; now, therefore,

Section 1. Be it enacted by the general assembly of the state

of Indiana, that all the surplus profits arising from the operation of, and which were received by the Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company from and after the date when said corporation had earned and received profits in its business from which it could and should, as in duty bound under this act, have declared dividends equal in the aggregate to the amount of the full sum invested and ten per centum per annum thereon, in excess of fifteen per centum per annum on the capital employed, after paying the expenses of operation and reserving such proportion as was necessary for future contingencies, be and the same are hereby declared to be due and payable to the treasurer of state for the use of common schools, and are hereby appropriated for that purpose.

Section 2. That the Terre Haute & Indianapolis Railroad Company, its officers, agents, employes and persons in possession thereof, without reference to the method or manner of their appointment or possession, are hereby required to forthwith account to the attorney general of the state for the amounts due and owing to the treasurer of state for the use of common schools, by reason of the excess of its receipts over and above its expenditures as provided and required by its charter and by the amendments thereto, and upon such accounting to pay over to said attorney general, for said treasurer of state, for the use of the common schools as aforesaid, the amounts so found due upon such accounting, being the total receipts by said railroad company up to and including the 17th day of January, 1873, from the period when the receipts arising from the operation of said road shall have equaled the amount invested in the construction of said road, together with interest thereon at the rate of ten per centum per annum, in excess of fifteen per centum per annum upon the capital used in the construction of said road.

Sec. 3. Said attorney general shall, immediately upon the passage of this act, make a demand upon said company, its officers, and any receiver in possession thereof under the order of any court, for such accounting and for the payment of the money due upon such accounting, under said charter and under any amendment or amendments thereto, to the treasurer of state, for the use of common schools.

Sec. 4. In the event said railroad company shall fail to promptly comply with said demand and to make such accounting and

to pay over said moneys to said attorney general, it shall be the duty of the attorney general to take such steps and proceedings in any court of competent jurisdiction, having jurisdiction of the subject matter thereof, to compel such accounting and the payment by said railroad company, or the receiver thereof under the appointment of any court, of the moneys so due to the treasurer of state for said common schools, under said charter or any amendments thereto, and for the purpose of enabling said attorney general to comply with this act, he is hereby authorized and empowered to employ such additional legal counsel as in his judgment is necessary, to assist him therein, and he and his assistants are further authorized to select and employ one or more expert accountants, and one stenographer to assist them in the performance of such duties.

Sec. 5. The governor, secretary of state and auditor of state are hereby constituted a board for the purpose of auditing and authorizing the payment of the expenses arising in the performance of the duties hereby imposed upon the attorney general and his assistants, and said board shall, upon the recommendation of the attorney general, from time to time, allow to the assistants so employed, the accountants and the stenographer, such sums as in the opinion of the board shall be justly due for the services rendered, and also all the expenses actually incurred; and thereupon the auditor of state shall draw his warrant for such sums upon the treasurer of state, and the same shall be paid out of any funds not otherwise appropriated. But the amounts to be paid to the said additional counsel or other persons so employed shall be determined by the board of audit hereinafter provided for.

Sec. 6. In event the railroad shall, in connection with the proceedings herein authorized, be directed to be sold by the decree of any court, and it shall be necessary in the opinion of the attorney general and his assistants to protect the interests of the state by bidding at such sale, they shall so recommend in writing to said board, and thereupon said board shall determine what amount should be bid in order to protect the interests of the state, and shall advise him of the limit beyond which he shall not bid, and upon such sale, said attorney general shall, in the name and for the use of the state, bid for said property according to his judgment, and not exceeding the amounts authorized by said board, and in the event of a sale to the state, the auditor of state shall draw his warrant upon the treasurer

of state for such sum, which shall be paid out of any sum in the treasury not otherwise appropriated, and upon the confirmation of said sale, the governor, with the concurrence and consent of the remaining members of said board, shall designate and appoint the proper officers to take charge of and operate said property, or said board may, in its discretion, lease the same until provision shall be made by the general assembly for the disposition of said property.

Sec. 7. The attorney general shall retain out of the moneys collected a commission of ten (10) per cent., and shall pay to the assistants so employed by him commissions not exceeding in the aggregate fifteen per cent., said commissions to be apportioned by the attorney general between said assistants in his discretion, and the residue of said moneys so collected shall by said attorney general be paid over to the treasurer of state for the use of common schools, except as to the amounts that have heretofore been paid out by the authority of said auditing board on account of the expenses of the litigation, which said sums shall be repaid to the general fund, and the residue only paid over for the use of (the) common schools: Provided, however, that no sums other than his actual expenses incurred during the litigation shall be paid to the attorney general, except as he shall collect from said railroad company, or its receiver, an amount for the use of common schools, and in the payment of such commission to the assistants, credit shall be given to the state for any sums that may have been theretofore paid to them or either of them in any manner on the allowances made from time to time by said board. And, provided further, that in the event any litigation that may be instituted to enforce such liability, shall not be fully and finally determined and the moneys collected and paid over before the expiration of the term of office of said attorney general, he shall continue in said employment as special counsel for the state until said litigation has been fully and finally determined, and the moneys collected and paid over, notwithstanding his term of office may have expired and his right, power and compensation shall be continued as though he were still acting as such attorney general, and as though said litigation had been completed during his term of office, but no auditing board shall be authorized to make any allowances or payments to him other than his actual expenses as aforesaid.

Sec. 8. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

v.

THE STATE OF INDIANA, EX REL. WILLIAM A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.

Case No. 18,903.
Term No. 264.

MOTION TO DISMISS OR AFFIRM.

The said defendant in error comes by his counsel appearing in that behalf and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment from which said writ of error purports to have been taken and is being prosecuted is the judgment of the Supreme Court of one of the United States, to-wit.: the Supreme Court of the State of Indiana, and that in and by the record of said cause it appears that

there is no federal question and no question cognizable or examinable by this Honorable Court upon a writ of error to said Supreme Court, made, shown or presented by said record.

And the said defendant in error by counsel as aforesaid also moves the court to affirm the said judgment from which the said writ of error purports to have been taken and is being prosecuted, because although the record in the said cause may show that this Honorable Court has jurisdiction in the premises, yet it is manifest that the said writ of error was taken and is being prosecuted for delay only.

WILLIAM A. KETCHAM,
Special Counsel for the State of Indiana.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

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Plaintiff in Error,

v.

THE STATE OF INDIANA, EX REL. WILLIAM A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.

Case No. 18,903.
Term No. 264.

NOTICE OF SUBMISSION OF MOTION TO DISMISS OR AFFIRM.

To Messrs. Samuel O. Pickens, John G. Williams and Lawrence Maxwell, Jr., Attorneys for Plaintiff in Error:

Please take notice that on Monday, the 28th day of March, 1904, at the opening of the court, or as soon thereafter as counsel can be heard, the motion to dismiss or affirm, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

WILLIAM A. KETCHAM,
Special Counsel for the State of Indiana.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Of Counsel.

We hereby acknowledge service of the above and foregoing notice and acknowledge that we have received from the Defendant in Error copies of the motion to dismiss or affirm the Writ of Error in the above cause, together with the brief in support thereof of the Defendant in Error, this 5th day of March, 1904.

SAMUEL O. PICKENS,
JNO. G. WILLIAMS,
LAWRENCE MAXWELL, JR.,
W.,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

ERROR TO THE SUPREME COURT OF INDIANA.

Case No. 18,903.
Term No. 264.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

v.

THE STATE OF INDIANA, EX REL. WILLIAM A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.

Brief upon the motion to dismiss on behalf of the Defendant in Error

The case before the court is a writ of error to the Supreme Court of Indiana in a cause in which the State of Indiana, ex rel. William A. Ketcham, Attorney-General, is plaintiff and the Terre Haute & Indianapolis Railroad Company is defendant. The suit was brought in the Superior Court of Marion County. The judgment of the court was for the plaintiff. [The opinion of that

court is in the record at page 93 to 104.] The defendant appealed to the Supreme Court, where the judgment of the Superior Court was affirmed, 159 Ind. 438. The opinion of that court is in the record at page 652 to 681. From that judgment the plaintiff in error prosecutes this writ of error. The defendant in error moves the court to dismiss the writ upon the ground that no federal question is presented by the record. The intelligible presentation of the motion will require a brief resume of the case, its subject matter and the proceedings had in it in the State courts.

By an act approved January 26, 1847, the General Assembly of the State of Indiana granted a charter of incorporation to a railroad company under the name of "The President and Directors of the Terre Haute & Richmond Railroad Company." By a subsequent act the name of the corporation was changed to "Terre Haute & Indianapolis Railroad Company," by which name it still exists and was sued in this case. In 1873 the company accepted the provisions of the general railroad law of the State. The incorporating act is set out in full in the record as an exhibit to the complaint at page 15. The only part of it necessary to be considered in this discussion is sections 22, 23, and 24, which are as follows:

> "22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road, or any part thereof, as shall be for the interest of said company, and to change, lower, or raise at pleasure: *Provided*, That the rates established

from time to time shall be posted in some conspicuous place or places on said road.

"23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the Legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving such proportion as may be necessary for future contingencies, shall be paid over to the Treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the Legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

"24. Semiannual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses; and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper."

The theory of the statute on which the suit was based was that under these provisions it was the duty of the railroad company to distribute its net earnings, less a reasonable reservation for contingencies, among its stockholders as dividends until such dividends amounted in the aggregate to the full sum invested by them and 10 per centum per annum thereon; that up to that time there was no limitation upon the rates which might be charged or upon the dividends which might be declared; that after that time the dividends could not exceed 15 per centum, and the surplus profits belonged to the State whether the Legislature exercised its right to regulate charges or omitted to do so. The State never did in fact exercise that power. It was the view of the plaintiff that its omission to prescribe rates was an adoption of those in force by the act of the company. It was charged in the complaint that the company had in fact earned and received as net profits large sums of money in excess of the full sum invested and 10 per centum per annum thereon, and in excess of dividends at 15 per centum after that reimbursement was complete; that it had concealed that fact and manipulated its stock and accounts in such manner as to make it appear in the reports given out to the public and otherwise that the time had not arrived when the dividends had amounted to the full sum invested and 10 per centum per annum thereon. The complaint sought an accounting covering all the business and transactions of the company from its organization until 1873. It asked that the account should be taken from the beginning in

the manner required by the act so as to give the State the benefit of whatever surplus profits had been made and would have been payable to the State if the terms of the law had been complied with from year to year as time passed by. This view of the rights of the State was sustained by the Superior Court and an accounting was had upon these principles, resulting in a finding and judgment for the State in the sum of $913,905.01.

The plaintiff's right to recover depended wholly upon the construction of the statute. As to this, a few questions were decisive. A cursory reference to the more important of them will show what the issues before the court were.

The first in logical order and in importance was whether or no under Section 23, the State must exercise its power to regulate tolls and freights before it could become entitled to surplus profits after payment of 15 per cent. dividends to the stockholders. As the State never exercised that power, a decision of that question in the affirmative would have put an end to the plaintiff's claim at once. But it was held by both the Superior Court and the Supreme Court that the right of the State to surplus profits did not depend on its previous exercise of the power to regulate. The discussion of this question occupies a large space in the opinion of the Supreme Court—from page 656 to 662 in the record in this court.

Perhaps the next most important question related to the meaning of the words "the full sum invested." The plaintiff stood upon the ground that they meant the

amount invested in the construction and equipment of the road by the stockholders; while the defendant claimed that they meant the full sum spent, from whatever source derived. The upholding of the defendant's contention on this point would have defeated the plaintiff's claim. The question is stated as follows in the opinion of the Supreme Court, on page 662 of the record here:

> "A spirited controversy prevails upon what is meant by 'the full sum invested' and 'capital employed' as used in §23. The State's insistence is that the term embraces only such sums as were contributed directly by those who purchased the corporation stock for the construction of the road, and the sum paid for bonds that were issued and used for construction, and subsequently converted, under their provisions, into shares of stock,—amounting in the aggregate to $1,216,690. On the other hand, appellant insists that the term means the full *cost* of the construction and equipment of the road,—whether contributed directly by the stockholders or taken from the earnings of the road, —amounting in the aggregate to $1,988,150. If the State's contention is right, there was received and appropriated by appellant, in excess of the amounts to which it was entitled under its charter, a large sum of money, and if appellant's contention is right, it received no more money than it was entitled to retain."

These questions were both decided in favor of the plaintiff, and that determination of them settled the case in the plaintiff's favor. The remainder was mere computation.

The Superior Court made the computation for itself and stated it in the opinion, year by year, from 1847 to 1873. It will be found on pages 101, 102 and 103 of the printed record in this court. This computation was discussed by the Supreme Court, and a restatement of the figures made on page 680-1 of the record, showing that the finding of the Superior Court might have been for a larger sum under the evidence.

Of course, in such an accounting a great many questions would arise in relation to details. There was quite a field of controversy as to stock which had been issued but which had to be excluded from the computation under the rule adopted by the court; also over the distinction which is often so difficult to make in such accountings between construction and maintenance, and many others of similar character. The filing of the Master's report was followed by thirty-eight exceptions by the plaintiff and eleven exceptions by the defendant. They occupy the printed record in this court from page 109 to page 133. Of those taken by the defendant nine were overruled and two were sustained. Of those taken by the plaintiff twenty-five were sustained and thirteen overruled.

It is not material to the subject before the court on this motion to go into the merits of any of these questions. Enough has been said to indicate the nature and scope of the controversy. The sole object of the suit was to enforce an obligation created by a statute of Indiana. The sole matters in the controversy were the construction of the statute, the effect of a former judgment in the Court of Indi-

ana, and questions incidental to the accounting. The defendant attempted to interpose certain defenses under the Constitution of the United States. But they were all of such nature as to be entirely unavailing if the construction which the court placed on the act of 1847 was the correct one. If the interpretation of that law set forth in the opinion of the Supreme Court is sound, the railroad company owed an obligation to the State to account for surplus profits which had never been discharged. If the principles upon which the account was made up in the final judgment were correct the right result was reached without color of violation of any provision of the Federal Constitution. That this is the true state of the case we shall endeavor to show more specifically in the discussion of the errors assigned, to which, after this preliminary general view of the case, we now proceed.

THE ERRORS ASSIGNED.

The first of the errors assigned is as follows:

> "1. That each of the following statutes of the State of Indiana is repugnant to section 10 of article 1 of the Constitution of the United States, and to article 5 and to section 1 of article 14 of the amendments to said Constitution, to wit:
>
> "The act approved January 27, 1897, p. 8. The act approved February 18, 1897, p. 38. The act approved February 24, 1897, p. 59. The act approved March 4, 1897, p. 145."

This is not an assignment of any error in the proceedings of any court. It is a mere attack on the Legislature of Indiana. It presents no question for the consideration of this court. But as other assignments of error to be discussed later rest on the alleged unconstitutionality of these laws, or some of them, it will be as convenient as otherwise to refer to them now with some general comments upon the questions which arise regarding them. And as it will be necessary for the court to read them at some time in the consideration of the case it will abridge the labor of that duty to set them out here in order and in full.

The first act named is that of January 27, 1897, which is as follows:

> "Whereas, By section twenty-three (23) of an act of the General Assembly of the State of Indiana, entitled 'An act to incorporate the Terre Haute & Richmond Railroad Company,' approved

January 26, 1847, it is provided among other things, that the surplus profits of said road in certain contingencies shall be paid over to the Treasurer of the State for the use of the common schools, and that it shall be the duty of said corporation to furnish the Legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same; and

"Whereas, It has been made known to this General Assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section, but the particular amount thereof is not known, and it is necessary that such statement shall be made in order that this General Assembly may be advised of what legislation is needed in order to enforce the rights of the State; and

"Whereas, The books and papers of said railroad company are now in the possession of the Terre Haute & Indianapolis Railroad Company; now therefore,

"Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That the Terre Haute & Richmond Railroad Company and the Terre Haute and Indianapolis Railroad Company be and they are hereby required to make and file with the Attorney-General of this State for the use of the General Assembly, on or before the 6th day of February, 1897, a statement under the oath of the President and Secretary of said roads showing:

"1. The amount of expenditures in the construction and operation of said roads from the 26th day of January, 1847, to the 17th day of January, 1873, inclusive.

"2. The total amount of receipts during the corresponding period.

"3. The total amount of profits in the operation of said roads during said period.

"4. The detail of the expenditures:

"a. In the construction of said road.

"b. In the operation thereof during the corresponding period.

5. What disposition has been made of the profits:

"a. By way of dividends declared and paid from time to time.

"b. By way of reinvestments or other disposition.

"Sec. 2. The Attorney-General of the State do immediately upon the passage of this bill cause notice thereof to be served upon the President or Secretary or some member of the Board of Directors of the said Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company, by personal notice if such officers or directors or either of them can be found within the State of Indiana, and in the event that neither or any of them can be found within the State of Indiana, by publication in a daily newspaper of general circulation printed and published in the cities of Indianapolis and Terre Haute, by three consecutive publications, and demand of said companies the making and furnishing of said statement.

> "Sec. 3. Immediately following the 6th day of February, 1897, or sooner in the event such statement is filed with him, the Attorney-General shall report to this General Assembly such statement, and in the event such statement is not filed with him, to report that fact, together with the steps that have been taken by him to notify said companies of the passage of this law."

This act simply calls upon the railroad company to account, and directs the Attorney-General to serve the notice and report the result to the Legislature. It does not direct nor authorize the taking of any of the company's property nor have any imaginable tendency to impair the obligation of any contract unless it shall be contended that the acceptance by the company of the provisions of the general law created a contract on the part of the State that it would never call on the company for an account under its charter. We are not willing to impute to counsel such a fanciful and far-fetched contention and prefer to rest in the belief that this act is not open to any constitutional objection which the plaintiff in error has pointed out or can claim in this case.

The second act named is that of February 18, 1897, which is as follows:

> "Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That section thirty-six of the above entitled Act be amended to read as follows:
>
> "Section 36. All existing railroad companies may acquire all the powers or benefits conferred by

this act, by filing an acceptance thereof in the office of the Secretary of State, properly attested as the corporate act of such company, and the acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act, and thereupon such company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified, as fully as they would have had and been if organized under this act: *Provided, however,* That whenever any railroad organized under any special charter granted by the State of Indiana, shall hereafter accept or shall have heretofore accepted the provisions of the general railroad law as embodied in said act, approved May 11, 1852, all rights and liabilities, whether inchoate or complete, in favor of the State of Indiana, shall be and they are hereby expressly reserved to said State notwithstanding such acceptance, and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the General Assembly may deem appropriate, and notwithstanding such acceptance any and all provisions of said charter may be amended, repealed or added to as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May 11, 1852."

The section amended by this act was part of the general railroad law of Indiana, being section 3932 of the Revised Statutes of 1881, and is as follows:

"Any existing railroad company may acquire all of the powers or benefits conferred by this act, by

> filing an acceptance thereof in the office of the Secretary of State, properly attested as the corporate act of such company. The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized; and, thereupon, such company shall possess such powers so accepted, and be subject to the obligations and restrictions herein specified, as fully as it would have had and been if organized under this act."

The amendment makes two changes in the original law. It omits the words "and a surrender of the act under which such company may be organized;" and it adds the proviso. Neither of these changes seem to us to affect the law in any respect material to this case. The acceptance of the provisions of a general law by a corporation organized under a special law means necessarily an acceptance of those provisions in lieu of the provisions of the special law. It would be a surrender of all rights, powers and privileges not conferred by the general law. It would put the corporation on equal footing with like corporations organized under the general law. It might affect an existing contract between the corporation and the State as to the future. It did have that effect in this case. It excused the railroad company from future payment of surplus revenue. But it did not and could not extinguish accrued and existing liability from the corporation to the State. All this would be equally true whether the acceptance of the general law be called a surrender of the special

charter or not. The corporation could not pay its debts in that way. The same remarks apply to the proviso. It was not necessary to add that reservation in order to preserve the vested rights of the State against a company accepting the general law. The amendments made by this act were both *ex industria*. But they were not without some justification in a former judgment of the Superior Court of Marion County, to which reference will be made later.

The third act named is that of February 24, 1897, which is as follows:

> "Section 1. *Be it enacted by the General Assembly of the State of Indiana*. That section twenty-three (23) of the above entitled act be amended to read as follows:
>
> "Section 23. That when the aggregate amount of dividends declared or earned received in excess of the operating expenses of said road shall amount or shall have amounted to the full sum invested in the construction of said road with ten per cent. interest per annum thereon, the General Assembly may so regulate the tolls and freights that not more than fifteen per centum per annum upon the amount invested in the construction of said road shall be divided on the capital so invested in such construction, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum upon the actual capital that has been invested in said road shall not be made; and it shall be the duty of the corporation to furnish the General Assembly, from time to time, whenever required, with correct

statements of the amount of its expenditures, not only in the construction of said road, but also in the operation thereof, and the amount of profits after deducting all operating expenses, which statements shall be made under the oath of the officer, or officers, whose duty it shall be to make the same; and at all times after the aggregate of the dividends declared shall amount, or shall have amounted to the sum used in the construction of said road and ten per centum per annum thereon, the surplus profits after reserving for division, or after making dividends at the rate of fifteen per centum per annum, and after reserving such reasonable proportion as may be necessary to provide for future contingencies shall be semiannually, on the first Monday in July and December of each year, paid over to the Treasurer of State for the use of common schools. And the General Assembly may, from time to time, as it may deem expedient, take such steps as it may deem necessary to compel said railroad company to comply with the provisions of this section, as herein amended, and to account for and pay over said moneys and said excess of profits to said Treasurer of State for the use of said schools, and whenever said General Assembly shall require an accounting from said railroad company such accounting shall cover the entire period covered by the operation of said road from its acceptance of its charter up to and including the period when said railroad company may have accepted the provisions of the general railroad law of the State. And the right of the State upon any such inquiry or upon any suit that may be authorized to compel such accounting shall be the same as though this amend-

ment had been originally a part of the charter of said railroad, and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the State: *Provided, however,* That nothing in this act contained shall be in anywise construed as lessening, impairing or releasing in any manner any right of or any liability to the State of Indiana by reason of anything contained in said original charter; all of which rights and liabilities are expressly reserved to said State as fully as though this section had not been amended."

The section amended by this act is the main foundation on which this suit rests. If the effect of the amendment was to vary the contract between the railroad company and the State which was embodied in the original section, so as to put a greater burden upon the company, it was, of course, to that extent void. But that was not its intention nor its effect. It was intended as a legislative construction of the act amended; and to express truly the meaning and the true construction of the law, as originally enacted. If this is so, the act is not open to any constitutional objection. But it is not necessary to decide this question. It may be conceded that this act was unconstitutional without exposing the judgment of the Supreme Court of Indiana to the criticisms made by the plaintiff in error, as will fully appear later.

The fourth act referred to is that of March 4, 1897, and is as follows:

"Whereas, On the 26th day of January, 1847, the General Assembly of the State of Indiana

granted a special charter to the President and Directors of the Terre Haute and Richmond Railroad Company, for the purpose of constructing and operating a railroad commencing at some point on the western line of the State of Indiana and running eastwardly through Terre Haute, Greencastle and Indianapolis to the city of Richmond; and,

"Whereas, Said railroad was constructed from a certain point on the western line of Indiana, eastwardly through Terre Haute, Greencastle to Indianapolis, under the privileges granted by said charter; and,

"Whereas, By the terms of an act approved March 6th, 1865, the name of said company was changed to that of the Terre Haute & Indianapolis Railroad Company, and by said act all the contracts, obligations and liabilities theretofore existing under the name of the President and Directors of the Terre Haute & Richmond Railroad Company were continued in full force, notwithstanding the change in the corporate name; and

"Whereas, By the terms and conditions of such charter, said corporation, among other things, was required to pay to the Treasurer of the State of Indiana, for the use of its common schools, certain of its surplus profits; and,

"Whereas, By the terms and conditions of said charter, it became and was the duty of said company to make and keep complete records of the expense of building and repairing said roads, and each section thereto, together with its incidental expenses, and also an account of the tolls and earnings thereof; and,

"Whereas, No sufficient or satisfactory statement or report has been made by said corporation or its successors to the General Assembly, or to any officer of the State, of the amount of expenditures or earnings, or of the amount of profits after deducting the expenses, or of the conduct of its business, so as to inform the General Assembly upon that subject, notwithstanding a demand therefor has been duly made upon said company and its successors, under the authority and by the direction of the General Assembly; and,

"Whereas, No moneys have ever been paid by said company to the Treasurer of State for the use of the common schools of the State, and it is believed and represented to the General Assembly that there is now and has for a long time been due to the Treasurer of State, for the use of said common schools, a large sum of money by reason of the excess of earnings over expenses under the terms and provisions of said charter as it originally existed, and as it has been subsequently amended, but it is not possible, except by judicial proceedings, to ascertain and determine the exact amount thereof; now, therefore,

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That all the surplus profits arising from the operation of, and which were received by the Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company from and after the date when said corporation had earned and received profits in its business from which it could and should, as in duty bound under this act, have de-

cared dividends equal in the aggregate to the amount of the full sum invested and ten per centum per annum thereon, in excess of fifteen per centum per annum on the capital employed, after paying the expenses of operation and reserving such proportion as was necessary for future contingencies, be and the same are hereby declared to be due and payable to the Treasurer of State for the use of common schools, and are hereby appropriated for that purpose.

"Section 2. That the Terre Haute & Indianapolis Railroad Company, its officers, agents, employes and persons in possession thereof, without reference to the method or manner of their appointment or possession, are hereby required to forthwith account to the Attorney-General of the State for the amounts due and owing to the Treasurer of State for the use of common schools, by reason of the excess of its receipts over and above its expenditures as provided and required by its charter and by the amendments thereto, and upon such accounting to pay over to said Attorney-General, for said Treasurer of State, for the use of the common schools as aforesaid, the amounts so found due upon such accounting, being the total receipts by said railroad company up to and including the 17th day of January, 1873, from the period when the receipts arising from the operation of said road shall have equalled the amount invested in the construction of said road, together with interest thereon at the rate of ten per centum per annum, in excess of fifteen per centum per annum upon the capital used in the construction of said road.

"Sec. 3. Said Attorney-General shall, immediately upon the passage of this act, make a demand upon said company, its officers, and any receiver in possession thereof under the order of any court, for such accounting and for the payment of the money due upon such accounting, under said charter and under any amendment or amendments thereto, to the Treasurer of State, for the use of common schools.

"Sec. 4. In the event said railroad company shall fail to promptly comply with said demand and to make such accounting and to pay over said moneys to said Attorney-General, it shall be the duty of the Attorney-General to take such steps and proceedings in any court of competent jurisdiction, having jurisdiction of the subject matter thereof, to compel such accounting and the payment by said railroad company, or the receiver thereof under the appointment of any court, of the moneys so due to the Treasurer of State for said common schools, under said charter or any amendments thereto, and for the purpose of enabling said Attorney-General to comply with this act, he is hereby authorized and empowered to employ such additional legal counsel as in his judgment is necessary, to assist him therein, and he and his assistants are further authorized to select and employ one or more expert accountants, and one stenographer to assist them in the performance of such duties.

"Sec. 5. The Governor, Secretary of State and Auditor of State are hereby constituted a Board for the purpose of auditing and authorizing the payment of the expenses arising in the performance

of the duties hereby imposed upon the Attorney-General and his assistants, and said Board shall, upon the recommendation of the Attorney-General, from time to time, allow to the assistants so employed, the accountants and the stenographer, such sums as in the opinion of the Board shall be justly due for the services rendered, and also all the expenses actually incurred; and thereupon the Auditor of State shall draw his warrant for such sums upon the Treasurer of State, and the same shall be paid out of any funds not otherwise appropriated. But the amounts to be paid to the said additional counsel or other persons so employed shall be determined by the Board of Audit hereinafter provided for.

"Sec. 6. In event the railroad shall, in connection with the proceedings herein authorized, be directed to be sold by the decree of any court, and it shall be necessary in the opinion of the Attorney-General and his assistants to protect the interests of the State by bidding at such sale, they shall so recommend in writing to said Board, and thereupon said Board shall determine what amount should be bid in order to protect the interests of the State, and shall advise him of the limit beyond which he shall not bid, and upon such sale, said Attorney-General shall, in the name and for the use of the State, bid for said property according to his judgment, and not exceeding the amounts authorized by said Board, and in the event of a sale to the State, the Auditor of State shall draw his warrant upon the Treasurer of State for such sum, which shall be paid out of any sum in the Treasury not otherwise appropriated, and upon the confirma-

tion of said sale, the Governor, with the concurrence and consent of the remaining members of said Board, shall designate and appoint the proper officers to take charge of and operate said property, or said Board may, in its discretion, lease the same until provision shall be made by the General Assembly for the disposition of said property.

"Sec. 7. The Attorney-General shall retain out of the moneys collected a commission of ten (10) per cent., and shall pay to the assistants so employed by him commissions not exceeding in the aggregate fifteen per cent., said commissions to be apportioned by the Attorney-General between said assistants in his discretion, and the residue of said moneys so collected shall by said Attorney-General be paid over to the Treasurer of State for the use of common schools, except as to the amounts that have heretofore been paid out by the authority of said Auditing Board on account of the expenses of the litigation, which said sums shall be repaid to the general fund, and the residue only paid over for the use of (the) common schools: Provided, however, That no sums other than his actual expenses incurred during the litigation shall be paid to the Attorney-General, except as he shall collect from said railroad company, or its receiver, an amount for the use of common schools, and in the payment of such commission to the assistants, credit shall be given to the State for any sums that may have been theretofore paid to them or either of them in any manner on the allowances made from time to time by said Board. *And, provided further*, That in the event any litigation that may be instituted to enforce such liability, shall not be

> fully and finally determined and the moneys collected and paid over before the expiration of the term of office of said Attorney-General, he shall continue in said employment as special counsel for the State until said litigation has been fully and finally determined, and the moneys collected and paid over, notwithstanding his term of office may have expired and his right, power and compensation shall be continued as though he were still acting as such Attorney-General, and as though said litigation had been completed during his term of office, but no auditing Board shall be authorized to make any allowances or payments to him other than his actual expenses as aforesaid."

The sole object of this act was to authorize and direct the bringing of this suit. It does not operate nor profess to operate to take the property of the plaintiff in error for public use or any other use or without due process of law. It proceeds upon the assumption that the railroad company was owing the State of Indiana a debt which it was refusing to pay, and it makes the necessary provision for the bringing of suit to collect the same.

The provisions of the Constitution which, it is said, in the first assignment of error, are violated by this legislation are the following:

Art. I, Sec. 10, which prohibits the passage by any State of any law impairing the obligation of any contract.

Art. V of the amendments, which prohibits the deprivation of any person of property without due process of law, and also prohibits the taking of private property for public use without just compensation.

Art. XIV of the amendments, Sec. 1, which forbids any State to deprive any person of property without due process of law, or deny to any person the equal protection of the laws.

This assignment of error alleges that each one of the foregoing statutes is repugnant to all of the foregoing provisions of the Constitution, which is absurd, even as a political charge against the Legislature. We shall see as we proceed that the other assignments are only a little less vague. So much for the first assignment of error.

The second assignment of error is stated in six subdivisions designated by letters. We will consider them separately. Error 2a is as follows:

> "In overruling the defendant's demurrer to the complaint, in so far as the demurrer is based on the Constitution of the United States."

This demurrer is found at page 36 of the printed record. It states first the statutory ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant; and in support of that allegation charges that the complaint seeks to take from the defendant property in which it has a vested right, and to accomplish that result invokes the aid of the laws enacted in 1897, which laws are in violation of the provisions of the Constitution before referred to.

There is no such thing known in the Indiana practice as a special demurrer. This pleading contains the language necessary to make a good general demurrer; and the other averments combined with that make it neither

better nor worse. The question presented by it was whether there was matter in the complaint, which, if true, would authorize the relief prayed for, or some part of it. That much being found, more would do no harm. If the act of 1847 created an obligation against the railroad company for the payment of surplus profits, and if the facts averred in the complaint were sufficient to show that such profits had been received by the company and that it had refused, on proper and authorized demand, to account for them, and that the action was not barred by a former judgment recited in the complaint, that was enough to require the court to overrule the demurrer. It was not necessary to consider the constitutionality of the acts of February 18 and February 24, 1897.

The court took this view on both points. The opinion of the Superior Court overruling the demurrer is in the record at page 37. It discusses at length the question of the construction of the act of 1847 and sustains the contention of the plaintiff in that respect. The cause of action which it finds in the complaint is rested wholly on the act of 1847.

In respect to the legislation of 1897 the court remarked in the opinion as follows, on page 42 of the record in this court:

> "In construing the provisions of the defendant's charter, so far we have given no consideration to the legislation enacted in 1897, for the reason that in so far as it attempts, if it does so attempt, to add or to change the liabilities or obligations of the defendant, whether by express provision, in-

terpretation, or retroactive operation, it is in violation of the Constitution, and therefore invalid.

"In so far, however, as such legislation provides a remedy for enforcing an existing obligation, or confers upon any officer authority to do any act or thing in the furtherance of existing rights, it is valid and binding."

This ruling of the Superior Court was affirmed by the Supreme Court with an express statement that the cause of action well stated in the complaint, was one resting on the law of 1847. The following is from the opinion:

"The State's action is based upon the obligations assumed by appellant in the acceptance of its original charter of 1847, or it has no case. This, in effect, is conceded by the State's counsel. An effort of the General Assembly by amendatory legislation in 1897, to create in the State a right in the earnings of appellant where none existed before, or to impose upon appellant any new charter liability, or obligation, would be so clearly unconstitutional as to leave no ground for argument. We are, therefore, inclined to dismiss the first contention with the observation that in so far as either of the acts of 1897, *supra*, attempts, if either does so attempt, to increase the liabilities, or to impose any new burden upon, or in any way change the obligations of appellant, the same is invalid, and the respective rights and liabilities of the parties must now be determined by their contractual relations entered into in 1847, in the same way as if the legislation of 1897 had never been enacted. However, as we read the complaint and understand

> the theory of the State, the late legislation is appealed to only as providing a remedy for enforcing the pre-existing charter obligations of appellant, and to this extent it is valid. *Cincinnati, etc., Co. v. Clifford*, 113 Ind. 460-466; *Webb v. Moore*, 25 Ind. 4; *Hopkins v. Jones*, 22 Ind. 310-315.
>
> "We pass then the legislation of 1897 as being out of the case, except as conferring certain powers upon the Attorney-General and as defining the procedure, whereby the claims asserted by the State, as arising under the original charter, may be fully and fairly contested with appellant."

If the Superior and Supreme Courts of Indiana had the right to construe the act of 1847, and if, when read as construed by them, that act imposes upon the defendant the obligation and liability charged in the complaint, then their decision raised no federal question. In order to develop a federal question in the record this court must first review the decision of the Supreme Court of Indiana as respects the construction of the Indiana statute of 1847, and find that it was erroneous, and then find that nothing remains to support the complaint except the acts of 1897, and that those acts were unconstitutional; and that, therefore, the plaintiff in error was denied the protection of the Federal Constitution by the Indiana court.

This can not be done. The construction of the act of 1847 does not involve any federal question. Whether "the full sum invested" means the full sum invested by the stockholders, or the full sum spent of money derived

from any source is not a federal question. Whether the obligation of the company to account for surplus profits depended upon an exercise by the State of its power to regulate tolls and freights, or not, is not a federal question. If the judgment of the Supreme Court of Indiana upon the construction of an Indiana statute is not subject to review by this court, then this court can not in this case disregard that part of the decision of the Supreme Court of Indiana upon which its decree rested in order to find in the record a federal question which the Indiana court did not profess to decide and did not decide.

The demurrer also contains this statement:

> "And in support of this demurrer defendant shows to the court, as one of the many imperfections of said complaint, that it seeks to take from this defendant property in which it has vested rights by virtue of its original charter and the amendments thereof, and by virtue of the judgment of this honorable court in the complaint set forth."

The sole object of the suit was to require the railroad company to submit to an accounting and to pay such sum as might be found due. The theory of the demurrer seems to be that a debtor has a vested interest in his liabilities, and to compel him to extinguish them is an invasion of his constitutional rights. It would be a happy day for some of us that would see that doctrine established.

The complaint did not seek to disturb the defendant in its title to or possession of its property, unless that result

should follow a decree rendered in the case establishing an indebtedness from the railroad company to the State. As against that result the company was entitled to interpose every defense which it had. It is quite absurd to say that a complaint of that sort seeks to deprive a defendant of his vested rights.

The reference to the judgment set forth in the complaint requires this explanation. Some years prior to the beginning of the present suit the State brought suit in the same court against the same defendant for a liability alleged to exist under the same law, in which suit there was judgment for the defendant upon a demurrer to the complaint. The complaint in this case recited the facts of the former suit and judgment with reasons why, as was claimed, that judgment was not a bar to the present suit. The sufficiency of the facts alleged to avoid the force of the former judgment was one of the questions presented by the demurrer. Unless they were sufficient in legal effect to show that judgment to be not a bar to the present action the complaint contained no cause of action. If they were the defendant had no vested right established by that judgment to be disturbed.

In overruling the demurrer to the complaint the court decided that under the law of 1847 a liability had accrued against the defendant, and that the former judgment had not extinguished that liability, if the facts stated in regard to it were true. If that decision was correct in point of law it infringed no vested right of the defendant.

Error 2b is as follows:

"In sustaining plaintiff's demurrer to the second paragraph of the answer setting up a defense under the Constitution of the United States."

The paragraph of answer referred to is found at page 45 of the record. The following is a summary of its allegations:

That by act of January 20, 1851, the company was relieved from the duty of building that part of its road lying between Indianapolis and Richmond;

That it afterward built and has continued to operate that much of the line authorized by its charter lying between Indianapolis and the Illinois State line, and no more;

That the company accepted the provisions of the general law in 1873;

That the Legislature of Indiana passed and the Governor approved the acts heretofore mentioned of January 27, February 18, February 24 and March 4, 1897;

That by the prosecution of this action the State is seeking to take the defendant's property for public use without compensation, and destroy vested rights and deprive defendant of its property without due process of law in violation of the same constitutional provisions before referred to.

This paragraph professes to answer the whole complaint. If, under the provisions of the act of 1847, the company had become indebted to the State, its acceptance of the general law would not extinguish the indebtedness; neither would that indebtedness be affected by the legislation

of 1897. The legal question to be decided in passing on the sufficiency of the answer was exactly the same question already decided in passing on the demurrer to the complaint. It was a question depending on the construction of the act of 1847. If the true meaning of that law was such that upon the facts stated in the complaint the company had become liable to the State for surplus profits under the obligations imposed by the law, then the facts stated in the answer were not sufficient to negative that liability. This was the view taken by the court. It did not hold that the acts of 1897 were constitutional. The view which it took of the act of 1847 made it unnecessary to decide that question in order to pass on the demurrer. As before, this court can not find any federal question in this part of the record without first creating one by reviewing and overruling the decision of the Supreme Court of Indiana in respect to its construction of the act of 1847, and thus leaving the State's cause of action to rest alone on Section 23 as amended by the act of February 24, 1897. We need not repeat the arguments already offered to show that that can not be done.

Error 2c is as follows:

> "c. In sustaining the plaintiff's demurrer to the eleventh paragraph of the answer setting up a defense under the Constitution of the United States."

The paragraph of answer here referred to is found in the record at page 58. The following is a summary of its averments:

That prior to 1872 the State of Indiana filed an information against the defendant company seeking a for-

feiture of its charter because of the same acts set forth in the complaint in this case;

That said action came to trial before a jury, but resulted in a disagreement;

That the State abandoned said action and brought suit in the Superior Court of Marion County in 1875 to recover money alleged to be due under the terms of the defendant's charter, and setting forth as the basis of its claims the same acts alleged in the complaint in this case;

That in that case a demurrer was sustained to the complaint and judgment for the defendant rendered thereon; which judgment was affirmed by the Supreme Court of Indiana;

That from that time until the bringing of this action the State of Indiana acquiesced in said judgment;

That in 1887 a majority of the stock of defendant company was sold for full value to purchasers without notice of any claim on the part of the State;

That again in 1893 a controlling interest in the said company's stock was sold for full value to purchasers in good faith without notice;

That relying on the acquiescence of the State in said judgment the defendant company had so extended its business and incurred obligations that it would be irreparably injured by being compelled to account for and pay over the profits claimed by the State;

That the State of Indiana, knowing all these things, by an act passed in 1897, authorized the Governor to buy the defendant's property at judicial sale;

That notwithstanding all these facts the State of Indiana is seeking in this action to destroy the defendant company's vested rights, take its property for public use without compensation and without due process of law in violation of the same provisions of the Constitution before mentioned;

That the persons who managed the affairs of the defendant company for the first twenty years of its existence died before the commencement of this action, and also others who managed its affairs from 1867 to 1877; so that the defendant is unable properly to defend against the alleged wrongs set out in the complaint;

That ever since the affirmance of the former judgment by the Supreme Court the State of Indiana permitted the defendant company to deal with its railroad and property without attempting to impeach the said judgment.

This plea may be characterized as a combination of laches and estoppel. It denies no allegation of the complaint and, therefore, admits them all; and so admits that the State once had a right to recover the profits sued for in the complaint. It invokes the protection of the Constitution of the United States, but it does not appear explicitly whether this is as an independent defense or in support of the defense of laches and estoppel. If the former, it must be considered as though the matter found in the next paragraph to the last on page 60 of the record, stood alone as a full defense to the action. It is evident that such a defense could not be a good one, whether the acts referred to were constitutional or not, and its dis-

allowance by the State court can not be assigned as error here. It would be a mere assertion of a right as a conclusion of law.

If the reference to the Constitution be taken as in aid of the other averments of the answer, it amounts only to this; that if the other defenses set out in the answer are valid in law and true in fact it will be a violation of the constitutional guarantees referred to to disallow them. It can not be a violation of those guarantees to disallow a proffered defense which is either insufficient in law or untrue in fact.

But how was it to be ascertained whether the defenses of laches and estoppel are valid in law and true in fact, or not? Had the court a right to consider and decide that question notwithstanding the threat in the belly of the answer that a writ of error would be taken if the defenses were not sustained?

It did do it. This is what was said on the subject by the Supreme Court:

> "The fourth answer in general terms, and the eleventh, specially, plead knowledge, acquiescence, and laches on the part of the State in bar of the action. The argument in support of these answers is that the contract by which the State had a right to participate in the profits of appellant was an ordinary business contract, outside the domain of sovereignty and in making the contract the State submitted itself to the same laws that govern individuals. We are unable to accept this argument. A sovereign, as such, has a right to name the conditions upon which it will grant another the right

to exercise a public power; and to require the payment of money, in a contingency, that may arise, as a means of preserving equality among those exercising like franchises, and to prevent excessive profits, is not an abdication of sovereignty, or an entrance into the domain of commerce within the meaning of the cases cited by appellant.

"Appellant is a *quasi* public corporation. Its charter was a matter of public record, equally open to all. The nature and basis of the State's claim was accessible to all dealers in its stocks and bonds. The action in *quo warranto* in Owen County, in 1874, and the suit in the Marion Superior Court in 1875, were public proceedings, and the legal effect of the orders and judgments was equally known to all. That there has been much procrastination is beyond dispute, but a wise public policy has long since forged the rule, now everywhere adhered to, that the State shall not be made to suffer from the delays, or negligence of its public officers. *United States* v. *Kirkpatrick*, 22 U. S. 720, 735; *Crane* v. *Reeder*, 25 Mich. 303, 320; *Farish* v. *Coon*, 40 Cal. 33, 50; *State* v. *Beviers*, 86 N. C. 588, 592; *Wallace* v. *Maxwell*, 10 Tredell (N. C.) 110, 112; *Gibbons* v. *United States*, 8 Wall. 269; *People* v. *Brown*, 67 Ill. 435.

"'It is a familiar doctrine,' says the court in the last cited case, 'that the State is not embraced within the statute of limitations, unless specially named, and by analogy, would not fall within the doctrine of estoppel. Its rights, revenues, and property would be at fearful hazard, should this doctrine (estoppel) be applicable to the State. A great and overshadowing public policy of preserv-

> ing these rights, revenues, and property from injury and loss by the negligence of public officers forbids the application of the doctrine. * * * The doctrine is well settled that no laches can be imputed to the Government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence, or even wilfulness of any one of its officials.' "

This question is one of the dignity, immunities and rights of the State; a question of administration of her own law in her own courts. If the State of Indiana has any sovereignty at all it would seem that she ought to have the right to declare her own policy on such a subject matter as against her own citizens. Would it be within the power of Congress to enact that in all suits between the State and the citizens the State should be responsible for the laches and estoppel by the acts and omissions of her officials? Would a contrary provision in a State Constitution be a violation of the Constitution of the United States?

Error 2d is as follows:

> "d. In overruling the defense set up in the third paragraph of the answer setting up a defense under the Constitution of the United States."

The paragraph of answer here referred to is found at page 47 of the record. The reply thereto is at page 52. A demurrer to the reply was filed (page 57) and overruled (Id. 58). The court found the facts to be as stated in the reply. It was only in this way and sense that the court "overruled the defense set up in the third paragraph."

The matter set up in the third paragraph of answer was the same former suit and judgment referred to in the paragraph last above mentioned, but stated with greater particularity of detail.

The reply alleged, among other things, that said former suit was instituted without authority, and without any previous demand on the part of the State, and that the judgment of affirmance by the Supreme Court was not on the merits, but in consequence of a defective record. The questions arising upon this defense are discussed in the opinion of the Supreme Court on pages 665 to 672. We quote the following from that part of the opinion:

> "There was something more in this case than a simple obligation and promise to pay money. As a condition precedent to any duty to pay or account for money received, certain collateral things were to be done that could be accomplished only by the co-operation of both parties to the contract. The railroad was to be built, money must be earned, expenses paid, repairs and ordinary improvements made, the sums contributed by the builders for the construction and equipment must be restored, a sufficient sum to meet future contingencies reserved, and a fifteen per cent. current dividend provided. All the money the company should receive in the operation of its road from the beginning should be its property,—much or little. The right of the State at no time attached to any part of the earnings until after the company had paid its operating expenses, refunded the investment, set apart a sum for future contingencies, and provided a fifteen per cent. dividend on its proper

capitalization. When these things were all done, if surplus profits remained, the duty of the company then arose to pay such surplus, as a surplus to the Treasurer of State. But how was it to be known when these things were accomplished, and when liability to the State arose without some basis or rule established, or agreed to by the parties for making the estimate? Will it be seriously contended that the General Assembly conferred upon the corporation power to arbitrarily settle for itself and for the State, what should constitute the 'full sum invested?' What operating expenses, and what a reasonable sum for future contingencies? If it did, in the doing of it, it must have known that it was sheer folly to provide for the payment of a surplus to the State. To hold that it was given over to the company conclusively to resolve as against the State after the road was put in operation, that all betterments, extensions, and extraordinary improvements paid for from the earnings, and bonded indebtedness incurred for construction, but paid from the profits, and divers other items, that represented not a dollar used in the construction of the road, may be, at the pleasure of the company, capitalized, counted, and refunded, as a part of the 'full sum invested' within the meaning of Section 23, is equivalent to holding that it was the legislative intent to place it wholly within the power of the corporation to defeat the State's right, by avoiding the accumulation of a surplus. * * *

"It is clear that the Legislature never intended that the corporation should have its own way with respect to what should constitute 'the full sum in-

vested,' what proper operating expenses, and other fit matters of accounting; for the right to require an accounting which implies the right to have it made on a fair and just basis, is expressly reserved. And while these grounds of settlement remained unadjusted, and in controversy, and the initiative rested upon the State, and the question of whether the company owed the school fund, remained problematical, and depended solely upon the rules that should prevail in the settlement, no duty rested upon the corporation to pay any sum to the Treasurer of State, and no right of action rested in the State for the recovery of money, with, or without a demand. The duty to account when required, as imposed by Sec. 23, means nothing more nor less, than the duty to settle and pay over to the Treasurer of State, any surplus disclosed, when requested or demanded by the Legislature to do so. * * *

"We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the General Assembly. This request was not made until 1897, and no actionable default by appellant had occurred prior to that date."

The court also found that upon the facts stated in the complaint in the former case as to the capital invested, earnings received, and dividends paid, it appeared on the face of the complaint that nothing was due to the State under the terms of the charter, and that the complaint was for that reason also, bad on demurrer. The discussion

of this point in the opinion is on pages 669 to 671 of the record of this court.

Upon these facts the court found, as matter of law, that the judgment against the State in the former case was upon a complaint which contained no cause of action, and that it was therefore no bar to a subsequent suit. No federal question appears in any part of the discussion. None can be injected into this part of the record without first reviewing and reversing the judgment of the Supreme Court upon the sufficiency of the defense pleaded as one of former adjudication.

Error 2e is as follows:

> "e. In holding the defendant liable to the State of Indiana, notwithstanding the surrender of its charter in 1873, and the former judgment of the Superior Court of Marion County, Indiana, adjudging that the defendant was not liable to the State of Indiana."

This assignment presents the same defense of former adjudication referred to in the last preceding assignment, in combination with the acceptance of the general law by the company, after the manner of a patent claim. If it has any novelty over the other assignments of error, it must be on the ground that, although the former judgment was not of itself *res adjudicata*, it had that effect because the company had previously accepted the general law. It does not appear to us that these two things can be supposed to have any connection as defenses unless on the same ground of estoppel which was set up in the 11th

paragraph of the answer and is discussed above, under assignment of error 2c.

Error 2f is as follows:

> "In giving effect to the said acts of the Legislature passed in 1897, hereinbefore mentioned."

As appears from what has been said, the Supreme Court did not give effect to any of those acts except the first one in date to the extent of holding that the demand authorized and directed by it was a necessary prerequisite to the maintenance of the suit; and the last one in date to the extent of holding that the express authority and direction given by it to the Attorney-General to begin the suit was also proper and necessary.

As was pointed out by the Supreme Court in the paragraph just quoted from the opinion, the duty imposed upon the company by its charter was, first, to do certain things; to build the road, or some part of it, to divide its net earnings as dividends, etc., and in a contingency which might, or might not arise, to pay its surplus profits to the Treasurer of State for the use of common schools; and second, "to furnish the Legislature, if required, with a correct statement of the amount of expenditure and the amount of profits after deducting all expenses;" that is to say, to account when called upon by the Legislature. This power in the Legislature to call for an accounting was not lost by delay in exercising it. It was never exercised until the passage of the act of January 27, 1897. Its exercise by the passage of that act was not the creation of any new

liability against the railroad company. It was the exercise of a right on the part of one of the contracting parties expressly contemplated and provided for in the original contract. That provision was precisely like the stipulation in a patent license that the licensee shall keep an account of sales and that the licensor shall be entitled to call for an accounting and to examine the books. It would have been within the line of the fair discharge of duty on the part of the railroad company to render its own account voluntarily to the Legislature at every session. But the charter did not in terms require such reports. It would have been equally within its right for the Legislature to call for a report and an accounting at every session. If it had done so there would have been no ground to claim that it was putting any burden on the company not within the terms of the original contract. The long neglect to exercise that right gives it no new legal character when it is finally acted upon. It was when required by the Legislature, and by no other department of the State government, that the company was legally bound to account. The law might as well have named the Governor as the State officer to require the accounting. If it had done so would there have been any ground to claim that the act of the Governor in calling for an account was an invasion of vested rights, or a taking of property for public use without compensation, or without due process of law, or anything else unconstitutional? No more was the same act by the Legislature. But the Legislature can act only by law or joint resolution. Hence the necessity and the right to enact the law of January 27, 1897.

As to the act of March 4, 1897, still less need be said. There was nothing in it except a direction to the Attorney-General to bring this suit together with reasonable and suitable directions in regard to its prosecution and the collection of the judgment, if one should be obtained.

We have already quoted from the opinion of the Supreme Court of Indiana the statement that if the Legislature of 1897 operated to change the obligation of the company as fixed by the law of 1847, it was to that extent void; but that so far as it only provided a remedy for enforcing the pre-existing charter obligations of the company it was valid. In support of that statement three prior decisions of its own were cited by the court, which distinctly sustain the proposition. But as this is a question concerning the application of a provision of the Constitution of the United States we suppose these decisions are not conclusive of the question here. The rule, however, does not rest on the decisions of the Supreme Court of Indiana. It is the general rule of the law.

Judge Cooley, in his work on Constitutional Limitations, says, at page 286:

> "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it is exercised at the time the contract was made.
>
> "It has accordingly been held that laws changing remedies for the enforcement of legal contracts

will be valid, notwithstanding the new remedy is less convenient than the old, or less prompt and speedy."

In the note he cites numerous cases from Federal and State court decisions, adding the following from the opinion of Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheaton 122:

> "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

"No one," says Mr. Justice Story, "will doubt that the Legislature may vary the nature and extent of remedies, so always that some substantive remedy be in fact left." Story's Con., Fifth Ed., Section 1385.

Penniman's Case, 103 U. S. 714 (720).
Fourth National Bank v. *Francklyn*, 120 U. S. 747 (755).
South Carolina v. *Gaillard*, 101 U. S. 433.
Antoni v. *Greenhow*, 107 U. S. 769.
Memphis v. *United States*, 97 U. S. 293.
Tennessee v. *Sneed*, 96 U. S. 69.
Railroad Co. v. *Hecht*, 95 U. S. 168.
Terry v. *Anderson*, 95 U. S. 628 (633).

This case is one which, as we see it, does not really need the application of this principle, because, as we have elsewhere stated, the remedy provided by the Legislature of 1897, is only that clearly contemplated by the law of 1847. Section 23 clearly imports that the State shall take the very steps authorized by the Legislature of 1897. If

these were not so, the right of the Legislature to provide by subsequent legislation any suitable and fair remedy is fully supported by the authorities which we have cited.

The real objection to the legislation of 1897 considered with respect to the remedy afforded for the enforcement of the rights conferred by the legislation of 1847 was not so much that the remedy afforded by the legislation of 1897 impaired or tended to impair the obligation of the contract of 1847 but rather that the remedy afforded was too successfully enforced.

The third assignment of error is as follows:

> "3. That the said acts of the Legislature of Indiana and the judgment and proceedings in this case deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws in contravention of the Constitution of the United States."

This assignment presents no question not presented over and over in the preceding assignments except the charge that the acts of the Legislature and the proceedings of the plaintiff in the case deny to the defendant the equal protection of the laws. Well; courts are provided in order that suits may be brought. From the filing of the complaint in this case to the handing down of the opinion of the Supreme Court the defendant had every opportunity known to the law to show that the plaintiff's claim was unfounded. All the machinery of the law was at its service to enable it to defend itself against wrong. What more does the "equal protection of the laws" require?

It is imaginable that it may be argued that by the acceptance of the general law by the railroad company it acquired a vested right to be let alone by the State, which the Constitution would protect. But, if that should be claimed, the same principle will apply. Whether the acceptance of the general law relieved the company from any obligation to account which the law of 1847 imposed upon it; whether it acquired by that act any vested right to property; whether the State was bound by the laches or estopped by the acts or omissions of its officials, were all alike questions to be tried. The company was duly summoned into court for the trial of them. They were not federal questions. They were regularly tried by courts having full jurisdiction of the company and the subject matter. The final judgment rendered upon them by the Supreme Court is not subject to review here.

It is manifest that these assignments of error present some very vague and shadowy grounds of complaint against the proceedings of the Indiana courts—mere charges, we submit, without color of foundation. It will be an economy of time to point out first, the particular claims of the plaintiff in error to which we believe this remark justly applies, and which ought therefore to receive no further consideration by the court.

If we turn from assignment 2a to that part of the record on which it rests, and to which we have particularly referred in the discussion of that assignment, we find that it was claimed that the State was seeking by its suit to take from the defendant property in which it had vested rights

under its orignal charter and by virtue of the former judgment in the case. The same claim underlies in part assignments 2b, 2c, and 2d.

The whole object of the suit was to compel payment of an alleged indebtedness. It did not seek to disturb the company's possession of or title to its property in any other way or for any other purpose. While the sale of a man's property on execution puts an end to his vested rights in it, it is a kind of invasion of that right which the constitution does not forbid.

In those parts of the record on which assignments 2b, 2c and 2d are in part founded it was charged that the State was seeking to take the property of the defendant for public use without compensation. The prohibition against this wrong found in Article V and Section 1 of Article XIV of the amendments has no applicability to the case of a debt due the State. The State was not seeking to take any of the company's property except in payment of indebtedness to be found due after judicial investigation and trial. Such a taking would neither be for public use in the sense of the constitution, nor without compensation. The compensation was received in the grant of the franchise. We submit that that claim has no color of foundation.

The same thing is true of the charge which in part underlies assignments 2b, 2c and 2d that the State was proposing to take the property of the defendant without due process of law. The object of the complaint was to invoke due process of law. The filing of it was the beginning of due process of law. It was an invitation to the defendant

to come into court and show cause why the prayer of it should not be granted. It did not seek to take any property from the defendant unless at the end of due process of law it should be found that the company was justly indebted to the State. Surely that claim has no color of foundation.

Aside from the questions involved in the construction of the law of 1847, and in the details of the accounting, the only issues in the case which were decided against the contention of the defendant were those presented by the defenses of the defendant resting on the former judgment, laches, estoppel, and the act of the company in accepting the provisions of the general law. These were all affirmative defenses, resting on facts which occurred after the whole liability alleged in the complaint and found by the court had accrued. In finding that they were insufficient the court did not destroy any vested right to property in the defendant, nor take its property for public use without compensation, nor without due process of law; nor will any of those results attend or follow the enforcement of the judgment by execution. The judgment may be unjust. The Superior Court and the Supreme Court may have erred in their construction of the act of 1847, or in overruling the defenses presented by the defendant, but it will not follow that the constitutional rights of the plaintiff in error have been violated. The United States Constitution guarantees the citizen against wrong at the hands of the courts of his own State at a few fundamental

points only. For the remainder he has to take his chances at the hands of the State courts.

In order to authorize this court to review the proceedings of a State court it must appear not only that the party asking the review set up in the State court a claim of some right or immunity resting on the Constitution of the United States, or some law of Congress, or some treaty or grant made by the United States, and that the claim was overruled or denied by the State court, but that it was one having color of foundation. An empty claim—one manifestly and on its face without merit, does not call on this court to look into the proceedings of the State court.

The preceding enumeration of the claims made by the defendant in the State court, embracing the charge that the State was seeking to destroy the defendant's vested rights, take its property for public use without compensation, and without due process of law, and deny it the equal protection of the laws, and the action of the court in overruling the defenses of laches, estoppel, former judgment and the acceptance of the general law, are all the claims which were made by the defendant (except one, to be noticed in a moment) which had in them any suggestion that the defendant's rights under the Constitution of the United States were being invaded or threatened.

We submit that those claims as grounds for the interposition of this court, are all frivolous; that it wants only the statement of them, taken in connection with the facts which appear in the record, hereinbefore stated, to disclose their utter want of merit; and that they have, therefore,

no color of foundation. If so, they may be dismissed at once from the consideration of the court.

On this proposition the recent case of *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, is in point. The suit in the State court was a proceeding in the nature of a *quo warranto* brought by the Attorney-General of the State to obtain a forfeiture of the charter of the New Orleans Waterworks Company.

The charter of the company contained a provision that if the company should fail to comply with its terms in regard to the price of water the city should be entitled to proceed against it by mandamus. The suit was begun under authority of a joint resolution of the General Assembly referring the subject to the Attorney-General for such action as he should deem proper. The trial court found for the company, but the Supreme Court reversed that decision and entered a decree forfeiting the company's charter.

The case has a touch of resemblance to the one before the court in its facts. The waterworks company's charter provided that its net profits should not exceed ten per cent. per annum, and that the city council should have the right to fix prices at such rates that the profits should not exceed that amount. Instead of paying its surplus profits to the city or the State the company was to give the benefit to the public by keeping its rates down to such point as would prevent the existence of any surplus; as the legislature of Indiana had the power to require with respect to the tolls and freights of the Terre Haute and Indianapolis Railroad

under Section 23 of the act of 1847, after the stockholders had received from dividends the full sum invested and ten per cent. per annum thereon.

The plaintiff in error paraded the same formidable catalogue of violated constitutional guarantees which are relied upon here. It was claimed that, as the charter provided that the remedy by mandamus might be employed to compel the company to maintain lawful rates, the proceeding to forfeit the charter for the same cause was a breach of the contract, a deprivation of property without due process of law, and a denial of the equal protection of the laws.

It was claimed also that the joint resolution referring the subject matter to the Attorney-General for such action as he might deem proper was a statute impairing the obligation of the charter contract, divesting vested right, and denying to the company the equal protection of the laws.

And more of the same sort.

In entering upon the consideration of the case the court, in the opinion by Peckham, Justice, laid down the following general rule:

> "It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of State courts that there must be something more than a mere claim that a federal question exists. There must, in addition to the simple setting up of the claim be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground

for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a federal question was plainly set up."

After the citation and discussion of numerous cases the opinion proceeds on page 351:

"The answer to the first question, as to mandamus being the exclusive remedy for illegal rates, is that the State court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by *quo warranto* at the suit of the State through its Attorney-General. The claim that by so proceeding there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of the laws, or a denial of the equal protection of the laws, has no colorable foundation.

"An examination of this question, among others, was made by the State court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no federal question.

"As to the second question, there is no State statute subsequent in date to the charter of the water company under or by virtue of which this proceeding was commenced, or which in any way affects the contract of plaintiff in error. The joint resolution of the Legislature of Louisiana referred the whole matter to the Attorney-General for him to bring suit to forfeit the charter or to take such

action as he might think proper. It was a simple authority, if any were needed, to present the question to the court, and neither the contract nor any other rights of the parties were in anywise altered by such resolution. The proceeding herein is based solely upon an alleged violation of the terms of the charter by the corporation; that question has been judicially determined after a full investigation by the State courts, and in a proceeding to which the company was a party, and after a full hearing has been accorded it in such proceeding. This was due process of law, and no federal question arises from the decision of the court.

"The same answer would seem to fit the other questions submitted by the plaintiff in error. They are all based upon the proposition that the judicial determination of these particular questions by the State tribunal was erroneous, and on account of such error the rights of the plaintiff in error, under the Federal Constitution, have been violated. But mere error in deciding questions of this nature furnishes no ground of jurisdiction for this court to review the judgments of a State court."

And on page 353:

"Neither the legislative resolution, nor the action of the Attorney-General, nor that of the Supreme Court of the State, nor all combined, can, as contended for by plaintiff in error, be in anywise regarded as the taking by the State of property without due process of law through the instrumentality of its legislative, its executive and its judicial departments, either jointly or severally. When analyzed, the whole claim is reduced to the asser-

> tion that in enforcing a condition which is impliedly a part of the charter, the State, through the regular administration of the law by its courts of justice, has by such courts, erroneously construed its own laws. This court in such a case has no jurisdiction to review that determination."

It appears to us that this decision must be taken as controlling in respect to the claims of the plaintiff in error which we are now discussing. It was there a question of forfeiting a charter granted by the State on account of failure by the corporation to obey the law by which its franchises were conferred. It is here a question of compelling a corporation to perform a duty imposed upon it by the law by which its franchises were conferred. In both cases alike the charter had to be construed, the facts of the company's conduct ascertained, and the proper judgment awarded. In doing this the State courts in both cases alike had full jurisdiction of subject matter and parties. In both cases alike, if the result reached by the court was right there was nothing for the defendant to complain of. In that case the defendant's contention, when stripped of all pretense, was, that the State court erred in its decision. The same thing is true of this case. If the State court put the right construction on the law of 1847, and was right in disallowing the defenses of former adjudication, laches, estoppel, and the acceptance of the general law, what just ground of complaint can the plaintiff in error have to urge in this court, or anywhere else?

In the foregoing enumeration of claims made by the plaintiff in error of invasions of its constitutional rights

by the proceedings in this case, and in our argument to show that those claims are all without color of foundation, we expressly excepted one to be considered later. That was the claim that it had been injured by the legislation of 1897. We have already said all that need be said, we think, in regard to the acts of January 27 and March 4—the first and the last of the series—to show that no constitutional right of the plaintiff in error was affected by either of them.

The second of the series—the act of February 18, 1897—is the one which amended the section of the general railroad law authorizing railroad companies organized under special charters to accept the provisions of the general law. The only question to be considered here in regard to that statute is whether the State court in holding that the railroad company's acceptance of the general law in 1873 did not operate to release it from liability to the State already incurred under the act of 1847 was giving an effect to the section so amended which it would not and could not have given to the original section. If the company's acceptance of the general law in 1873 under the section as it then stood did not release it from its existing obligations to the State under its original charter, the amendment of the section did not hurt it, and it has no cause of complaint here on that ground. This particular question was not discussed in the opinion of the Supreme Court further than to say in general terms at the foot of page 673 of the record in this court that "The acceptance in 1873 of the general railroad law of 1852 had no effect

in relieving appellant from unperformed duties, assumed in its charter contract of 1847." This is in form a statement of the effect of the acceptance of the general law as that law stood in 1873. "The acceptance in 1873" * * * "had no effect"—that is, had none at the time. If we take in connection with this language the statement in the opinion on page 655 of the record in this court, that:

> "We pass, then, the legislation of 1897 as being out of the case, except as conferring certain powers upon the Attorney-General, and as defining the procedure, whereby the claims asserted by the State, as arising under the original charter, may be fully and fairly contested with the appellant,"

we are bound to construe the decision of the court to be that the company's acceptance of the general law as it stood at the time had no effect to release its existing liability to the State. These are both Indiana statutes—the act of 1847 and the general railroad law of 1852. The effect of the acceptance of the latter statute by a company created by the former is a mere question of construction of Indiana statutes; and upon which this court will not review the action of the Supreme Court of Indiana.

We may assume for the argument, however, that the plaintiff in error may claim that it does not clearly appear that the Supreme Court rested its decision that the company's liability to the State was not discharged by its acceptance of the general law wholly on the effect of such an acceptance under the original section, and that it is therefore at liberty to urge that that decision rested on the sec-

tion as amended by the act of February 18, 1897. We would then have a case in which the decision of the Supreme Court may be referred to either one or two statutes. In such a case this court will treat the decision of the State court as resting on that one of the two statutes which will support it without infraction of the constitutional rights of either party. Applying that principle, it will be the duty of this court to treat the decision of the Supreme Court as resting upon its construction of the act of 1847, and the general law of 1852, and not upon the amendment of 1897. Upon this point authorities will be referred to a little later.

This leaves for final consideration the act of February 24, 1897—the act which amended section 23 of the law of 1847. This act is set out in full on page 15, *ante*, and section 23 of the original law will be found on page 3. A careful reading of the amending act will show that it expresses substantially what the Supreme Court found to be the true construction of section 23 of the original law. That was its manifest intention—to express the will of the Legislature in respect to the construction of the law of 1847. No doubt such a legislative construction would be unavailing as against a different judicial construction; but in so far as it expresses the true judicial construction it is harmless—a mere re-enactment of the law, without change.

The more important point, however, is, that the Supreme Court expressly placed its decision on the law of 1847, as it was enacted originally, and expressly put aside

the act amending that law as not necessary to be considered. We have already quoted twice from the opinion the express statement of the court to this effect found on page 655 of the record of this court. We have, therefore, a decision of the State court based expressly upon a State statute to which no objection can be made; and we have another State statute which may be invalid upon the ground that it impairs the obligation of the contract embodied in the former statute, upon which the decision might have been based, but was not. It is as simple an illustration as can be found of the absence of a federal question.

The cases in this field are embarrassing in number. It seems to import a want of respect to the court to cite any of them. They are the court's own decisions, and largely of recent date. We can not help feeling that the statement which we have made of the contents of the record will be at once recognized as sufficient to bring the case within the class of those in which no jurisdiction exists here to review the action of the State court. It is only because it seems to us possible that we may abridge the labor of the court somewhat by bringing together a few of those cases which appear to us to be controlling that we ask attention to what follows.

In *Eustis* v. *Bolles*, 150 U. S. 361, Eustis, the plaintiff below, was a creditor of Bolles and Wilde, who filed a petition under the insolvent laws of Massachusetts. In the proceedings under that petition there was a composition as authorized by the statute, by which the insolvents were

discharged by payment of fifty cents on the dollar. Eustis opposed the composition and discharge on the ground that the composition statute, having been passed after the execution of his note, was a violation of that provision of the Constitution of the United States which forbids any State to pass a law impairing the obligation of contracts. But he accepted his money under the composition, being one-half of his claim. Subsequently he brought suit for the remainder of his claim. The defendant set up the discharge, and the plaintiff replied that the law was unconstitutional. The court held that he was estopped by his acceptance of his share under the composition. Eustis took a writ of error to this court. It was dismissed. The opinion, by Mr. Justice Shiras, embraced a comprehensive statement of the rules which obtain in such cases, from which we quote the following from pages 366-7:

> "It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. * * *"
>
> "It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, also

has been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment. * * *"

"Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the federal question, and this court will then take jurisdiction. * * *"

"Where, in an action pending in a State court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively

appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it can not be presumed to have been entertained by the State court."

And further, on pages 368-9:

"The record, however, further discloses that William T. Eustis, represented in this court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

"The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors notwithstanding their discharge.

"In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of *Clay* v. *Smith*, 3 Pet. 411, where it was held that the plaintiff, proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt,

> he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a federal question. Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the federal question."

In *Bacon* v. *Texas*, 163 U. S. 207, the suit was by the State of Texas to recover 300,000 acres of land which, it was alleged, was unlawfully held by the defendants, Bacon and others. It appears in the case that the State of Texas, by act passed July 14, 1879, offered the lands in dispute and other lands for sale upon certain conditions; that the defendants claimed that they had purchased the lands in compliance with the terms of the act; that afterward, in 1883, the State passed a law repealing the act of 1879, which law, as the defendants claimed, was void because it operated to impair the obligation of their contract with the State under the prior law. The State relied, as ground of recovery, upon the claim that the defendants had not complied with the terms of the law of 1879, and so had not made a valid purchase under that law; and this claim was sustained by the State court. The writ of error to this court was dismissed. The following extracts from the opinion by Mr. Justice Peckham exhibit clearly the ground of the decision. First from page 216:

> "Where the federal question upon which the jurisdiction of the court is based grows out of an

illegal impairment of the obligation of a contract, it is now definitely settled that the contract can be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a State court, by some subsequent statute of the State which has been upheld or effect given it by the State court. * * *"

"If the judgment of the State court gives no effect to the subsequent law of the State, and the State court decides the case upon grounds independent of the law, a case is not made for a review by this court upon any ground of the impairment of the contract."

And on page 219:

"The case is not altered by the fact that the State has passed an act which the defendants assert impairs the obligation of their contract, so long as the court, in deciding their case, holds that they never had a contract, because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act, and without upholding or in any manner giving effect to any provision thereof.

"Whether the statute of 1879 permitted a survey to be adopted from a survey which had previously been made in the field, or whether it did not, was a case of construction of a State statute by the State court. It is not one of those cases where this court will construe the meaning of a state statute for itself. This court, even on writ of error to a State court, will construe for itself the meaning of a statute as affecting an alleged contract where it is

claimed that a subsequent statute passed by the State has impaired the obligations of the contract as claimed by the party, and where such subsequent statute has by the judgment of the State court in some way been brought into play and effect been given to some or all of its provisions. In such a case this court construes the contract in order to determine whether the later statute impairs its obligation. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697. This is not such a case. The later statute is not given effect to by the judgment of the court.

"The State of Texas by the act of 1883 withdrew its public lands from sale. The prior act of 1879 had offered them for sale. Whether the act of 1883 withdrew them or not could have no bearing upon the question whether these defendants had complied with the act of 1879 in relation to having the surveys made of the lands which they applied to purchase. If the lands had not been withdrawn, the parties' rights in them would depend upon whether they had been surveyed, and if they had not, they had no right to them. Whether they had or had not complied with the act of 1879 was not a federal question. If the court had decided that the survey actually made was a sufficient compliance with the act, but that the defendants obtained no vested rights in the land by virtue of such survey, and that the act of 1883 was effectual in withdrawing such lands from market, that decision would have been reviewable here, and in that case this court would determine for itself what rights the parties obtained under the act of 1879, and whether by what they had done they had ob-

tained any rights which could not be unfavorably affected by the act of 1883."

There was also a question in the case which involved, to some extent, the effect of the law of 1883. The facts and the judgment of the court upon them appear fully in the following quotation from the opinion—pages 226-7:

> "We have thus far treated this case as if the sole question arising in it were not of a Federal nature. It will be seen, however, that certain tenders were made to the treasurer of the State of Texas in payment for lands claimed by the defendants to have been purchased by them, and some of those tenders were held by the trial court to have been insufficient, because they included tenders of payment for some lands where the surveys had been made after the passage of the act of 1883 repealing the act of 1879, as well as for surveys made before that time, and the defendants did not separate or offer to separate in their tenders the surveys made before the repeal from those made after, and there was consequently, as the trial court held, no legal tender for any of the surveys, and upon these facts the court founded a conclusion of law (No. 4), which is as follows: 'Bacon and Graves have never paid or offered to pay, for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of the land for which they tendered payment on May 19, 1883, were made after the fifty per cent. act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made

after, and there was consequently no legal tender.' That was one of the five different grounds upon which the trial court held that the defendants had not complied with the law and were not entitled to purchase the lands in question. This particular finding is in no way dependent upon the others, and they are all entirely separate and distinct from one another. The finding No. 2, that 'they did not comply with the law by having the lands surveyed, as was required by law, and therefore could not purchase it,' is a distinct and separate ground for the judgment of the court to rest upon to the same extent, as if none other had been stated, and it is entirely sufficient in itself upon which to rest the judgment.

"If the fourth finding, above set forth, had alone been made by the court below, this court, upon writ of error, would have had jurisdiction to review the whole question, because by that finding some effect is given to the subsequent act of the legislature which, it is claimed, impaired the obligation of defendants' alleged contract with the State; but where there are two grounds for the judgment of the State court, one only of which involves a federal question, and the other is broad enough to maintain the judgment sought to be reviewed, it is now settled that this court will not look into the federal question, inasmuch as there is another ground upon which the judgment can rest, and it will dismiss the writ for that reason."

In *Seneca Nation* v. *Christy*, 162 U. S. 283, the defendants came into possession of some land which in 1826, under the Indian Intercourse Act of 1802, had been con-

veyed by deed by the Seneca Nation to T. O. & R. The deed was not ratified by the Senate of the United States or proclaimed by the President, as provided by act of congress. The nation was authorized by act of 1845 to sue to protect its reservations, and pursuant to this act it brought this action in ejectment in 1885. Defendant pleaded the validity of the grant and the statute of limitations. The Court of Appeals, affirming the judgment below, held that the transaction was valid and not in contravention of the provisions of the Federal Constitution or of the Indian Intercourse act of 1802, and that even if invalid the statute of limitations was a bar to the action.

The Supreme Court dismissed the writ for the reason that the State court rested its decision, among other grounds, upon the enabling act of 1845, and it said:

> "As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on the subject and can not be maintained."

In *Henderson Bridge Co.* v. *Henderson City,* 141 U. S. 679, the city of Henderson sued to recover taxes claimed by the city against the company on account of its bridge across the Ohio river. The city assessed the bridge for taxation to the low water mark on the Indiana side of the river, the act incorporating the city having so fixed its boundary. Defendant claimed that the bridge was over the water of the Ohio river, which was a naviga-

ble stream, under the jurisdiction of the United States, and that the taxing of such property violated the Constitution of the United States. The Court of Appeals held that the company had voluntarily, by accepting the ordinance by which it obtained the right to occupy the street in Henderson and the land on that side of the river to low water mark, agreed that the whole bridge should be taxed.

The Supreme Court held that the judgment of the State court was based wholly upon the company's acceptance of the ordinance, and that the case involved no federal question. We quote as follows from the opinion of Mr. Justice Blatchford, pages 688-9:

> "Although a federal question may have been raised in the State court, yet if the case was decided in that court on grounds not involving a federal question, but broad enough to sustain the decision, this court will refuse to entertain jurisdiction. *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39, 46; *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Hale* v. *Akers*, 132 U. S. 554, 564, 565; *Hopkins* v. *McLure*, 133 U. S. 380, 386, 387; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307.
>
> "The opinion of the State court is based wholly upon the ground that the proper interpretation of the ordinance of February, 1882, was that the bridge company voluntarily agreed that the bridge should be liable to taxation. This does not involve a federal question, and is broad enough to dispose of the case, without reference to any Federal question. This court can not review the construction which was given to the ordinance as a contract, by the State court."

This is a stronger case in its facts than the present one. It was an extraordinary assumption of power on the part of the Legislature of Kentucky to extend the taxing limits of the city of Henderson to the Indiana shore. If the law was void it would seem to be a nice question whether the bridge company could give it any effect by agreement with the city. Suppose the bridge had been part of a railroad extending from Henderson to Indianapolis. Could the company have made a valid agreement that the whole railroad should be taxed by the city of Henderson? But this court would not look into that question. It accepted the decision of the Kentucky court without the slightest question. In the present case the Indiana court construed the law of 1847 and based its judgment for the plaintiff wholly upon that law. In the Kentucky case, if the judgment of the State court as to the effect of the bridge company's acceptance of the terms of the ordinance was correct, the company had nothing to complain of. In this case, if the Supreme Court's construction of the law of 1847 was correct, the plaintiff in error has nothing to complain of.

In *Hopkins* v. *McLure*, 133 U. S. 380, the suit in the State court was by McLure, as administrator, to subject lands to sale and marshal the assets. The estate was insolvent. Hopkins was a creditor who held a mortgage which had been foreclosed by a decree upon which the mortgaged property had been sold, leaving an unsatisfied balance. The question was, whether as to that balance he was a preferred creditor in the class of mortgagees, or belonged in the class to which the claim secured would be-

long if there had been no mortgage. The State court held that he belonged to the latter class.

The question was curiously complicated by some contradiction among the prior decisions upon the subject in the Supreme Court of the State—South Carolina. A statute passed in 1789 prescribed the order in which the debts of a decedent should be paid. The statute was construed in 1822 and again in 1846 to mean that the balance unsatisfied after the sale of mortgaged premises on foreclosure was a simple contract debt of the grade to which the instrument secured by the mortgage belonged. In 1875 these decisions were overruled by *Edwards* v. *Sanders*, in the Supreme Court of the State, and it was held that the unsatisfied balance was still a mortgage debt under the statute. In 1885 *Edwards* v. *Sanders* was overruled by *Piester* v. *Piester* and the old construction re-established. In 1878 the Legislature passed an act amending the former statute so as to provide expressly that in the settlement of decedents' estates a mortgage should not be entitled to priority except as to the particular part of the estate covered by the lien.

The plaintiff in error in this court, Hopkins, claimed that as his debt was contracted in 1876, while the decision in *Edwards* v. *Sanders* was the declared law, the amending act of 1878, operated to impair the validity of his contract. The following extract from the opinion by Mr. Justice Blatchford, page 386, shows the ground upon which this contention was overruled:

"It is contended on the part of the plaintiffs in error that the decision of the court below was based upon the application of the act of 1878 as a valid act, affecting the contract of the plaintiffs in error and impairing its obligation. But the validity of that statute was not drawn in question, and the Supreme Court did not pass upon it. The decree of that court does not rest upon that statute, but upon independent grounds. The decision rests upon a ground broad enough to cover the entire case, without considering the statute. It rests upon the ground that the law of South Carolina, under the act of 1789, was such as it had always been held to be, in *Tunno* v. *Happoldt, Kinard* v. *Young,* and *Piester* v. *Piester,* and that the law as so declared had always been the law, and was not varied or changed by anything decided in *Edwards* v. *Sanders.* That being so, we must hold that no Federal question is presented by the record.

"This view is in accordance with the decisions of this court in *Kreiger* v. *Shelby Railroad Co.,* 125 U. S. 39; *DeSaussure* v. *Gaillard,* 127 U. S. 216; *Hale* v. *Akers,* 132 U. S. 554, the ruling in which cases is, that where the Supreme Court of a State decides a Federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

We have pointed out that the act of February 24, 1897, amending Section 23 of the law of 1847, expressed in sub-

stance that which the Supreme Court of Indiana declared in this case to be the true construction of the original section. The South Carolina act of 1878 expressed that which the Supreme Court of that State declared was the prior law under the construction given to the law of 1789. It was entirely true to say that the State court in the case just cited gave effect to the rule laid down in the amending act of 1878. But it was not a new rule.

In the present case it may be that the Supreme Court gave effect to the principles and rules stated in the act of February 24, 1897. But they were also the principles and rules of the original section. They were nothing new.

In *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39, the question was whether or no the Shelby Railroad District had a right to vote at stockholders' meetings upon stock held by it in the Shelby Railroad Company. The company was organized in Kentucky by act of the Legislature of March 15, 1851, its stock was to be subscribed for by any individual or corporation, and at each stockholders' meeting "each stockholder was to be allowed one vote for each share owned by him, her or it." Shelby County was authorized to subscribe for stock in behalf of the county, to be paid for by agreement between it and the commissioners or directors taking the subscriptions; the purchase funds to be obtained by levy on all taxable property in the county. On February 3, 1869, an act amending the charter was passed authorizing a certain defined portion of the county to subscribe for any amount of the stock not exceeding $300,000, the subscription to be first voted upon

by the legal voters of that portion of the county, bonds to be issued and given to the railroad company to pay for the same, and a tax levied on the property in that portion of the county not to exceed 1 per cent. in one year. By an act of March 11, 1870, a further amendment was made that that part of the county was then to have power to vote at the stockholders' meetings by certain officers mentioned. By an act of February 26, 1873, the same part of Shelby County was given the corporate name of Shelby Railroad District of Shelby County.

The District, pursuant to the act of 1869, subscribed for stock, issued its bonds and levied the tax, and had always voted its stock prior to the institution of these suits. Kreiger was a tax payer and also bought some stock. Plaintiffs in error contended that the statutes of 1851 and 1869 created a contract by which the stockholders of the company were those persons who had become so by subscribing for stock or by the payment of taxes, and the right to vote upon stock subscribed for by counties or other municipal subdivisions was in tax payers only; and that the statutes of 1870 and 1873 first granted to the District the right to vote as a stockholder in the company, and thereby impaired the obligation of the contract created by the earlier statutes. The State court construed the act of 1851 as amended by the act of 1869, and held that the legal effect of the act of 1869 was to make the District a corporation and entitle it to vote and receive dividends upon the stock of the company. It held further that the acts of 1870 and 1873 did no more than to make that cer-

tain which was before uncertain or had been omitted from the original act.

The Supreme Court dismissed the writ. We quote the following from the opinion by Mr. Justice Gray, on page 46:

> "It thus appears that the State court, upon full consideration, decided that the acts of 1870 and 1873 conferred no new rights, but only defined more clearly the manner in which the rights conferred by the earlier statutes should be exercised; and that it based its judgment entirely upon the construction and effect of the earlier statutes, and upon grounds which would have been equally controlling if the later acts had not been passed. The necessary conclusion is that this court has no jurisdiction to review those judgments. *Bank of West Tennessee* v. *Citizens' Bank of Louisiana,* 13 Wall. 432; S. C. 14 Wall. 9; *Palmer* v. *Marston,* 14 Wall. 10; *Kennebec Railroad* v. *Portland Railroad,* 14 Wall. 23; *Stevenson* v. *Williams,* 19 Wall. 572; *New Orleans Waterworks* v. *Louisiana Sugar Refining Co., ante,* 18."

In *Adams County* v. *Burlington & Missouri Railroad Co.*, 112 U. S. 123, the county brought its action against defendant company to quiet its title in certain lands. The county asserted title under the swamp land act of 1850 and the railroad company under the Iowa land grant act of May 15, 1856. The county contended that the lands in question were selected as swamp lands by the county surveyor under the authority of the Secretary of the Interior and Commissioner of the Land Office, as well as the

Governor and Legislature of Iowa; that the report thereof to the Commissioner of the Land Office was made in 1854, and that, therefore, the right of the State to a patent for the said lands was perfected by the act of March 3, 1857. The railroad company contended that in 1861 the claim of the county to these lands was submitted to the said Commissioner for final adjudication; that defendant appeared and contested the claim; that the Commissioner decided the county's claim to be fraudulent and unfounded, and on October 25, 1862, the said Commissioner conveyed the said lands to the State of Iowa for railroad purposes, pursuant to the act of Congress of May 15, 1856, which lands the State conveyed to defendant; and that plaintiff since 1861 voluntarily abandoned all claim to the said lands, recognized defendant's title to the same and had regularly taxed same as defendant's property. The State court held that defendant was the legal owner of the land and that plaintiff by its acts and conduct was estopped from claiming the same or denying defendant's title thereto. Plaintiff was allowed a writ of error to the Supreme Court. The Supreme Court dismissed the writ and stated that two questions were presented by the pleadings: One, whether the county acquired a title in equity to the lands in dispute under the operation of the swamp land act, supplemented, as it was, by the act of March 3, 1857; and, two, whether, if it did, it was estopped by its subsequent acts from setting up that title as against defendant. It held that the decision of the State court rested on the second question, which was clearly non-federal, and, in referring to that decision, the court, by Mr. Chief Justice Waite, said:

"This brings us to the inquiry whether it appears sufficiently that the case was disposed of below on this defense. If it does, the motion to dismiss must be granted, and having no jurisdiction, we can not pass on the correctness of that decision.

"The record discloses that this separate and distinct defense was made, and that it in no way depended on the validity or invalidity of the original title of the county. In our opinion it is clearly to be inferred from the decree of the court of original jurisdiction, which was affirmed in the Supreme Court, that the decision in favor of the company was placed entirely on that ground. So far as the original bill of the county is concerned, the decree finds in favor of the company and dismisses the bill. Then, as to the crossbill, it finds the legal title to be in the company, and that the county is estopped from claiming the lands or denying the company's title thereto. This, of itself, implies that there was, in fact, no decision against any right, title, privilege or immunity claimed under the Constitution or laws of the United States, and that the decree rested alone on the defense of estoppel which was broad enough to control the rights of the parties without disposing of the Federal question which it was attempted to raise. In other words, it was adjudged by the State court that the title of the company must prevail in this suit because the county was precluded by its conduct from insisting to the contrary."

In *McManus* v. *O'Sullivan,* 91 U. S. 578, plaintiff claimed title to certain property which T. M. had entered in 1854 and held possession of until 1861, when he died.

Defendants entered the premises when T. M. died and held adversely to his estate until 1867, when this suit was filed. The City of San Francisco during T. M.'s possession claimed title to the land under a Mexican pueblo right, and the Circuit Court of the United States in 1865 decreed the land in favor of the city. In 1866 an act was passed to quiet title to certain lands in San Francisco. The questions presented to the State court were whether possession necessarily connects itself with the true title in the absence of proof to the contrary, and whether possession within the meaning of the statute of limitation in California is adverse to one who claims title, if it is not adverse to all the world.

The State court decided that possession did not carry with it the presumption that plaintiff held under the city title, and that if the possession of the defendants was adverse to him it was a bar to his right of action, even though it was not adverse to all the world.

The Supreme Court dismissed the writ and held that these questions were within the exclusive jurisdiction of the State courts, saying, by Mr. Chief Justice Waite:

> "Their decision against the plaintiff made it unnecessary to consider the proposed federal question. Thus it is seen that the federal question was, in fact, not decided; and that in the view the court below took of the case such a decision was not necessary."

It can hardly be necessary to burden this court with the citation of further authorities, but for the purpose of

showing that this court has taken no backward step and that the principle has been adhered to by an unbroken current of decisions we cite in addition the following:

Blount v. *Walker*, 134 U. S. 607, at 614.
Beatty v. *Benton*, 135 U. S. 244, at 254.
Hammond v. *Johnston*, 142 id. 73.
Delaware etc., Co. v. *Reybold*, 142 id. 637, at 643.
O'Neil v. *Vermont*, 144 id. 323, at 336.
Miller's Exe'tr v. *Swann*, 150 id. 132.
California, etc., Works v. *Dairy*, 151 id. 389, at 393.
Snell v. *Chicago*, 152 id. 191, at 196.
Rutland, etc., Co. v. *Central Vt., etc., Co.*, 159, id. 631, at 641.
Mo. Pac. Ry. Co. v. *Fitzgerald*, 160 id. 556, at 576.
Dibble v. *Billingham, etc., Co.*, 163 id. 63, at 69.
Un. Nat'l Bk. v. *Louisville, etc., Co.*, 163 id. 325, at 331.
Harrison v. *Morton*, 171 id. 38, at 47.
Pierce v. *Somerset Ry.*, 171 id. 641, at 650.
Chappel, etc., Co. v. *Sulphur, etc., Co.*, 172 id. 465, at 471.
McQuade v. *Trenton*, 172 id. 636, at 640.
White v. *Leroy*, 174 id. 91, at 96.
Seeberger v. *McCormick*, 175 id. 274, at 280.
Moran v. *Horsky*, 178 id. 205.
Hale v. *Lewis*, 181 id. 473.

Indeed, in the more recent volumes the cases depending on the principle have been disposed of on a *per curiam*,

this court deeming the question no longer entitled to discussion or opinion.

Citing cases in this field is like gathering apples in a fruitful orchard—one is never ready to stop. Certainly we have burdened the court with enough of them if we understand aright their meaning and their application to the questions presented by this motion. It must be admitted that the act of 1847 imposed upon the railroad company a duty to pay surplus profits to the State in some amount in some contingency. No one ever denied that. The question was: In what amount and in what contingency? Counsel for the company contended, first, that the obligation to pay anything would not arise under the statute until the Legislature had exercised its power to regulate tolls and freights. That was the contingency. They contended further that the act proceeded upon the assumption that the Legislature, in exercising that power, would prescribe such rates that the payment of dividends at 15 per cent. would absorb the net profits as closely as possible. But it would be beyond the wisdom of the Legislature to accomplish that object perfectly—to anticipate the business of the road so accurately that a tariff of rates could be framed that would yield net profits exactly sufficient to pay dividends at 15 per cent. In order to be sure to have enough profits for that purpose it would be impossible to avoid having some surplus. This was all that was to go to the State. That was the amount. The school fund was to be used as a slop jar for the reception of such driblets of surplus revenue as would accrue in spite of the

efforts of the Legislature to prevent it. That was the theory of counsel for the defendant.

The theory of counsel for the State was that the statute was, first, a prohibition against the retention by the company of more than 15 per cent. per annum upon its capital stock out of its profits after the stockholders had received in dividends the full sum invested by them, with 10 per cent. per annum thereon; and, second, a requirement that the company should pay all its net profits after the payment of dividends at the prescribed rate, to the Treasurer of State, for the use of common schools, whether much or little, and whether the rates were regulated by law or not.

Upon such a construction of the statute the Legislature would be at liberty to adopt either one of two policies—either to fix the tolls and freights at the lowest standard that would produce 15 per cent. dividends, and so give the patrons of the road the advantage of low rates; or to fix them at such higher rate as the business would bear and give the resulting larger profits to the school fund. That was the great question in the case. This court will not review the State court's decision of it. A construction of the powers of the Supreme Court of the United States which would permit such review would totally destroy the independence of the State courts, and of the State governments.

This is only a sample of the questions that were presented in the case. It would serve no useful purpose to enter upon the others even in such mere statement as this. To follow them out in detail would show that by the time

the court disposed of the controverted questions respecting the construction of the statute of 1847, the right of the State to an accounting, and the principles upon which the accounting must be conducted were completely established without the slightest reference to any subsequent legislation or other ground of liability.

There remained then only the affirmative defenses tendered by the defendant—the former adjudication, laches, estoppel, and the acceptance of the general law. These were all either questions of Indiana State law and practice, or general law and practice; and this court will no more review the decision of the State court upon them than upon a pure question of statutory construction.

It appears to us that the cases which we have cited cover the whole ground of debate on this motion, both in the parallelism of the issues and questions presented and decided, and the pertinence, clearness and force of the principles enunciated so completely as to leave no respectable standing ground for opposition to our contention that the writ of error ought to be dismissed.

Respectfully submitted,

WILLIAM A. KETCHAM,
Special Counsel for State of Indiana.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

Supreme Court U. S.
FILED
APR 27 1904
JAMES H. McKENNEY,
Clerk

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

v.

THE STATE OF INDIANA, EX REL. WILLIAM A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.

No. 264.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIFF FOR THE DEFENDANT IN ERROR.

WILLIAM A. KETCHAM,
Speeial Counsel for Defendant in Error.

ROBERT S. TAYLOR,
ROSCOE O. HAWKINS,
FERDINAND WINTER,
Of Counsel.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,
v.
THE STATE OF INDIANA, EX REL. WM. A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.
No. 264.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT.

IN ADDITION TO THE FACTS CONTAINED IN PLAINTIFF IN ERROR'S STATEMENT OF THE RECORD.

The complaint declares upon the special charter granted to the plaintiff in error by the act of the general assembly of Indiana of January 26, 1847, as containing in its 22d,

23d and 24th sections a contract obligation which was sought to be enforced by the suit. (Record, pp. 2-4.)

It sets out the special charter in full, as exhibit "A," as required by the code of pleading and practice as to written instruments which are the foundation of the action.

1 Burns R. S. 1901, §365.

It avers that the 35th section of the special charter was repealed in 1848 at the procurement and with the consent of the defendant (now the plaintiff in error), but refers to said section and makes it a part of the complaint "for the purpose of arriving at the true construction to be given to section 23, which, with the remainder of sections 22 and 24 remained in full force, unamended and unrepealed except that the 23d section was amended by the act of February 24, 1897." (Acts 1897, p. 59.)

In this connection the amended section is set out. (Record, p. 3.)

The complaint further states the acts done by plaintiff in error in effecting an organization under the special charter, in accepting and assuming the franchises granted thereby, and in constructing, completing and operating its railroad, and then states the rights granted to and the obligations imposed upon plaintiff in error, as to fixing tolls and freight, the amount of dividends that might be paid, and the time of payment thereof, the sum upon which dividends should be computed, and as to payment of the surplus earnings to the state treasurer for the use of the common schools. These statements all have reference to sec-

tions 22, 23 and 24 of the act of January 26, 1847, in their original form. (Record, pp. 4-5.)

It is averred that by the act of January 27, 1897 (Acts 1897, p. 8), the plaintiff in error was required by the general assembly to make a true statement of the cost of construction of its railroad, operating expenses and gross and net receipts, and that in pretended compliance with the act a pretended statement was made, but only upon the information of the then officers of plaintiff in error by whom it was made, who stated that the details could not be given because the books professing to show such facts were not in their possession. That thereupon the act of February 18, 1897 (Acts 1897, p. 38), to amend section 36 of the general railroad law, and also the act of February 24, 1897, to amend section 23 of the act of January 26, 1847, were passed, and afterwards the act of March 4, 1897 (Acts 1897, p. 145), which latter act appropriated for the use of the common schools the surplus earnings of the plaintiff in error claimed to be payable to the treasurer of state, and required plaintiff in error to account with the attorney-general in relation thereto, and authorized the attorney-general to demand such accounting, and payment of the moneys found thereby to be payable. It is further averred that such demand was made, but that plaintiff in error had wholly failed, neglected and refused to comply therewith. (Record, p. 14.)

The complaint also averred the facts in reference to the suit brought in 1875 in the superior court of Marion county, Indiana, by the state upon the relation of the then

attorney-general against the plaintiff in error to recover the same moneys, and set out the complaint in that suit in full as exhibit "B." It is averred that a demurrer to the complaint was sustained, that the plaintiff refused to amend the complaint, and elected to abide thereby and thereupon judgment was rendered that the plaintiff take nothing by the action. Copies of the demurrer and judgment are set out as exhibits "C" and "A." It is averred that the attorney-general was without authority to institute and prosecute the suit. The complaint in that suit contained no averment that the general assembly of the state had ever authorized a demand to be made for an accounting in respect of the moneys for the recovery of which the suit was brought, or for the payment of such moneys, or that any such demand had been made. (Record, pp. 12-13, 22-35.)

The plaintiff in error demurred to the complaint upon the general ground that it did not state facts sufficient to constitute a cause of action, and upon the specific grounds that it sought to deprive plaintiff in error of its vested property rights by virtue of the original charter and the judgment set forth in the complaint, and to accomplish that result invoked the aid of the laws enacted in 1897, which said laws, and all of the acts of defendant in error in endeavoring to deprive plaintiff in error of its property and to invalidate said judgment, were in violation of section 10 of article I, and of article V of the constitution of the United States, and of section 1 of article XIV of the amendments to said constitution. (Record, p. 36).

This demurrer was overruled, and the opinion of the court given thereon, was made a part of the record by order of the court, in accordance with the Indiana practice. (1 Burns R. S. 1901, §662.) The opinion appears in the record at pp. 37-45.

It shows that the court held that the contract obligation to enforce which the suit was brought, must be found exclusively in sections 22, 23 and 24 of the act of January 26, 1847, without reference to the legislation of 1897, and that by the provisions of these sections, an obligation was imposed upon the plaintiff in error to account for and pay over to the treasurer of state for the use of the common schools, but not until after demand had been duly made, its surplus earnings remaining after reservation of a fund for contingencies, the payment of dividends on the full sum invested in the shares of capital stock until the aggregate of such dividends equaled such sum and 10 per centum per annum thereon, and, thereafter, of an annual dividend of 15 per centum on such sum (record, pp. 37-41); that the attorney-general had authority to bring the former action (record, pp. 42-43), but that the judgment therein was not a defense to the pending action, for the reason that the causes of action were not the same, inasmuch as the complaint in the former action did not aver that a demand for accounting and payment had been made, and no such demand had in fact been made, whereas in the pending action the complaint averred that such demand had been made before the action was begun. (Record, pp. 43-45.) As to the special contention made

by the demurrer that the cause of action sought to be enforced depended upon the legislation of 1897, and that such legislation was void as being in violation of the constitution of the United States, the court said:

> "In construing the provisions of the defendant's charter, so far we have given no consideration to the legislation enacted in 1897 for the reason that in so far as it attempts, if it does so attempt, to add or to change the liabilities or obligations of the defendant, whether by express provision, interpretation, or retroactive operation, it is in violation of the constitution, and therefore invalid. In so far, however, as such legislation provides a remedy for enforcing an existing obligation, or confers upon any officer authority to do any act or thing in the furtherance of existing rights, it is valid and binding." (Record, p. 42.)

The opinion further shows that the Act of 1851 by which plaintiff in error was relieved of its obligation under the special charter to construct a railroad extending from Richmond, Indiana, by way of Indianapolis and Terre Haute, to the Illinois state line, and permitted to construct a railroad extending only from Indianapolis to the state line, was relied upon by plaintiff in error in support of the demurrer, and being a public act was considered by the court, which held that it did not relieve plaintiff in error from the obligations in favor of the state created by sections 22, 23 and 24 of the special charter. (Record, pp. 41-42.)

Also that the question as to whether the acceptance by plaintiff in error in 1873 of the general railroad law, and the surrender thereby effected of the special charter under the provisions of section 36 of the general railroad law, the fact of such acceptance and surrender being averred in the complaint, was considered and decided by the court, which held that "the only effect of such action was to release plaintiff in error's right to operate under the special charter thereafter, but in no way affected plaintiff in error's obligations to the state, or other parties, previously incurred, as to which the special charter would remain in full force until such obligations were discharged." (Record, p. 42.)

In plaintiff in error's statement, it is said the second, third and eleventh paragraphs of answer set up a defense under the constitution of the United States, and that the court sustained a demurrer to the second and eleventh paragraphs, and at the trial, overruled the defense under the constitution of the United States set up in the third paragraph. The second paragraph (record, p. 45) tendered no issue of fact. It averred that at the solicitation of plaintiff in error, and before any part of its railroad had been completed and put in operation, the general assembly amended its special charter by an act approved January 20, 1851, by which plaintiff in error's railroad was terminated at Indianapolis instead of Richmond, Indiana, and that plaintiff in error had only constructed and operated its railroad between the Illinois state line and Indianapolis. It also averred that plaintiff in error ac-

cepted the provisions of the general railroad law on the 17th day of January, 1873. It denied that at the time of such acceptance it was indebted to the defendant in error in any sum for any profits made in the operation of its road, or was now so indebted. It contained nothing in addition except the assertion that the legislation of 1897 is invoked by defendant in error to deprive it of its property and vested rights in violation of the constitution of the United States. The third paragraph was demurred to but this demurrer was overruled (record, p. 52), and a reply to said paragraph was filed (record pp. 52-56), to which the plaintiff in error demurred. This demurrer was overruled. The third paragraph of answer averred the institution of the former suit in the superior court of Marion county, and the rendition of the judgment therein in favor of the plaintiff in error on demurrer to the complaint. It did not set out a copy of the complaint, either independently or by reference to the copy set out as an exhibit with the complaint in this action. It averred that the matters adjudicated in said case were and are one and the same as those mentioned in the complaint in this action, and that the judgment upon demurrer was a full, final and complete settlement of all matters connected with or in any way referring to any and all claims of the state of Indiana against plaintiff in error, for the payment by the plaintiff in error of any portion of its profits to the treasurer of the state for the use of the common schools of the state of Indiana, under the said Act of January 26, 1847, and all matters connected with or in any

way referring to the claims of the state of Indiana for an accounting with or the payment by plaintiff in error to said state of Indiana for the use of its common schools of any portion of the profits or earnings of the plaintiff in error under the terms of the original charter and the acts amendatory thereof. (Record, pp. 49-50.) The reply set out a copy of the complaint in the former action and averred that at the time of the institution of the said suit in 1875, there had been no demand made upon the plaintiff in error for an accounting or for the payment of any sum, nor had there been any authority conferred by the general assembly upon the attorney-general, or any other officer of the state to demand such accounting, or payment, or to institute a suit therefor, and said suit was instituted, prosecuted, and said judgment rendered, without any demand or without any authority to make any demand upon the defendant therein, in that behalf, and that there was no averment in the complaint that a demand for an accounting or for the payment of moneys upon such accounting had been made, or that the defendant had denied its liability or had refused to account and pay, wherefore it was denied that the judgment upon such complaint determined the cause of action presented by the complaint in this action. (Record, p. 55.) As to the legislation of 1897 which the third paragraph of answer averred was relied upon by the plaintiff, now defendant in error, to vacate and annul the judgment in the former action and to destroy the vested rights of defendant in and to its property, earnings and profits accrued previous

to 1897 under the provisions of its original charter and the acts amendatory thereof, and take defendant's property for public use without just compensation, and to deprive defendant of its property and the enjoyment thereof without due process of law in violation of the constitution of the United States (record, p. 50); the reply denied that such legislation had been enacted, or effected, or was relied upon by the state for any such purpose, and averred that on the contrary said legislation was enacted for the purpose of providing for the enforcement against the defendant, now plaintiff in error, of the rights in favor of the state, as they, at that time, existed without seeking, in any manner whatever, to change said rights or to create a new or other liability than such as then rested upon said defendant. (Record, p. 55.) The plaintiff in error's demurrer to this reply was overruled. (Record, pp. 57-58.)

The issues of law were upon the demurrers to the complaint and the demurrers to the second, third and eleventh paragraphs of answer and to the reply to the third paragraph of answer. The issue of law upon the complaint, was whether under sections 22, 23, and 24 of the Act of January 26, 1847, upon the facts stated that there was in the possession of the plaintiff in error at the time it accepted the general railroad law, a sum of money from the earnings of its railroad, in excess of the full sum invested in its shares of capital stock and 10 per centum per annum thereon until the time when the dividends declared had equaled such sum, increased by such per centum, and also of subsequent dividends on the sum so

invested at the rate of 15 per centum per annum, and the further facts also stated in the complaint as to the change in the length of plaintiff in error's railroad made with its consent by the Act of 1851, and of its acceptance of the general railroad law, and of the judgment rendered upon demurrer to the complaint in the suit begun in 1875, the defendant in error was entitled to recover such sum, upon demand for an accounting and payment made pursuant to the Act of March 4, 1897, before the bringing of the suit, and, if so, whether the legislation of 1897 was invoked in the complaint by the defendant in error to create an obligation upon the plaintiff in error, either independently of or in connection with the provisions of the Act of January 26, 1847, to pay such sum to the defendant in error, and in that case, whether such legislation was in violation of the constitution of the United States. The issue of law upon the second paragraph of the answer was whether under the facts stated therein, that by the act of the general assembly of the state of Indiana, approved January 20th, 1851, which had been accepted and adopted by the plaintiff in error, the railroad, provided to be constructed by the act of January 26th, 1847, was terminated at Indianapolis, Indiana, instead of Richmond, Indiana, and had so remained ever since, that plaintiff in error had constructed, owned and operated only that portion of the railroad authorized by its charter, which lies between Indianapolis and the Illinois state line, constituted a defense to the cause of action stated in the complaint, and if so, whether the

defendant in error was attempting to deprive the plaintiff of such defense by invoking the legislation of 1897, and in that case, whether such legislation was invalid as being in violation of the constitution of the United States; the allegation in said paragraph that at the time the general railroad law of 1852 was accepted by plaintiff in error, it was not, nor is it now, indebted in any way to the state of Indiana for any of the profits made by it in the operation of its railroad, nor to the state of Indiana, nor to the treasurer of said state, nor to the common schools thereof in any sum whatever, being not well pleaded, as it was provable under the general denial contained in the first paragraph of the answer.

The issues of law decided against the plaintiff in error, were: That the obligation sought to be enforced, was created by the Act of January 26, 1847; that the Act of January 20, 1851, enacted at the instance of the defendant and accepted by it, amending the Act of January 26, 1847, so as to permit the defendant to construct its railroad from Indianapolis to the Illinois state line only, instead of from Richmond to the Illinois state line, and under which it had constructed only that part of the line so permitted to be constructed, did not relieve it of such obligation; that the acceptance of the general railroad law by plaintiff in error, did not extinguish such obligation; that the judgment in the former action, in favor of the plaintiff in error, upon demurrer to the complaint, which did not aver that a demand had been made before the bringing of the suit, for an accounting and payment of

the moneys sued for, when, in fact, no such demand had been either authorized or made before the bringing of the suit, was not an adjudication which would bar the pending action brought for the recovery of the same moneys, after a demand for an accounting and payment had been authorized and made, and in which that fact was averred; and finally that such obligation was not impaired by the Act of March 4, 1897, or any vested property or contract right of the plaintiff in error invaded by said act, by which the attorney-general was authorized to demand an accounting and payment of any sum of money owing by virtue of such obligation.

The issues of law in so far as they involved the assertion by defendant in error, if there was any such assertion, that the legislation of 1897 was or could be invoked to create an obligation not created by the Act of January 26, 1847, and existing at the time such act was surrendered by acceptance of the general railroad law, or to impair the obligations created by such act, or to deprive plaintiff in error of any vested property or contract rights, were in every instance decided in favor of the plaintiff in error both by the trial court, and the supreme court of the state.

ARGUMENT.

THE JUDGMENT AGAINST THE PLAINTIFF IN ERROR DOES NOT DEPEND IN ANY RESPECT UPON THE DENIAL TO PLAINTIFF IN ERROR OF ANY RIGHT SECURED TO HIM BY THE CONSTITUTION OF THE UNITED STATES, AND NO FEDERAL QUESTION IS INVOLVED.

The jurisdiction of this court in the present case depends upon whether in the court below the defendant in error asserted the validity of the legislation by the general assembly of the state of Indiana, of 1897, and that the plaintiff denied such validity on the ground of its being repugnant to the constitution of the United States, and that the decision was in favor of its validity, or whether any right claimed under the constitution of the United States, and specially set up and claimed by the plaintiff in error, has been denied.

1 Compiled Statutes U. S. 1901, §709;
Duncan v. State of Mississippi, 152 U. S. 377;
De Saussure v. Gaillard, 125 U. S. 18;
Missouri v. Andriano, 138 U. S. 497;
McNulty v. The People, 149 U. S. 645.
Carothers v. Mayer, 164 U. S. 325;

It is only the federal question thus presented that can be reviewed in this court.

Ashley v. Ryan, 153 U. S. 436.

Where the case was decided in the court below on an independent ground, broad enough to maintain the judg-

ment, and not involving a federal question, this court will dismiss the writ of error without considering the federal question.

Beatty v. Benton, 135 U. S. 244;
Marrow v. Brinkley, 129 U. S. 178;
Hale v. Akers, 132 U. S. 554;
Eustis v. Bolles, 150 U. S. 361;
Costello v. McConnico, 168 U. S. 674;
Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

If merely the construction of state statutes is involved the writ of error will not lie.

Insurance Co. v. The Treasurer, 11 Wall. 204;

Nor will it lie to review the decision of the court below upon questions of fact.

Dower v. Richards, 151 U. S. 658;
Hedrick v. Atchison, T. & Santa Fe Ry. Co., 167 U. S. 673;
Egan v. Hart, 165 U. S. 188.

Nor to review decisions upon questions of the admission or rejection of evidence which does not bear directly upon some matter of a federal nature.

Cleveland, C., C. & St. L. R. Co. v. Backus, 154 U. S. 439;
Central Pac. Ry. Co. v. California, 162 U. S. 91.

Under these principles there is no federal question presented by the record.

There was at no stage of the case any claim or assertion by the defendant in error that the legislation of 1897 which the plaintiff in error contended, by its demurrer to the complaint, was the foundation of the contract obligation sought to be enforced by defendant in error, was in fact relied upon in the slightest degree as creating or in any way affecting such obligation. On the contrary the defendant in error set out in the complaint as the foundation of his right of action the Act of January 26, 1847, as containing the contract sued upon. It was made an exhibit as required by the code of practice in reference to written instruments which are the foundation of an action, or defense. The complaint in stating the obligation sought to be enforced referred in terms to the 23d section of the Act of 1847, in its original form, as containing such obligation, and in charging the breach of the obligation, it was averred to consist of the failure and refusal of the plaintiff to account for and pay to defendant in error, upon demand, a sum of money, being its surplus earnings remaining after an accounting upon the basis provided by that section, and which was required by that section to be paid to the treasurer of state. But even if there had been any claim or assertion by defendant in error of the validity of the legislation of 1897 and of rights claimed thereunder against the defendant in error, the decision of the court below, at the very inception of the proceedings, was against such claim and assertion, and in favor of the contention of the plaintiff that such legislation was invalid. The demurrer to the complaint filed by the defendant in

error, was special as well as general. It not only proceeded upon the ground that the complaint did not state facts sufficient to constitute a cause of action, but charged specifically that no cause of action was stated except one which depended for the contract obligation sought to be enforced, upon the legislation of 1897, and that such legislation was invalid because it was in violation of the constitution of the United States. The trial court held in ruling on the demurrer, and by such ruling established as the law of the case, which was adhered to in all subsequent proceedings in that court, and affirmed by the judgment of the supreme court of the state, that the legislation of 1897 in so far as it attempted, if it did attempt, to impose any obligation upon plaintiff in error that did not exist under the special charter of 1847, or to deprive plaintiff in error of any vested property or contract rights relating to the subject matter in suit, was void as being repugnant to the constitution of the United States and that the only cause of action stated in the complaint was the one created by the 23d section of the Act of 1847.

The question was presented by the demurrer precisely as if the complaint had been in two paragraphs, each attempting to state a distinct cause of action; one declaring upon the charter of 1847 in its original form, without in any way referring to the legislation of 1847, except to the Act of March 4, which provided for the making of a demand for an accounting and payment, and only relying upon that act for that single purpose; and the other declaring upon the legislation of 1897 as not only provid-

ing for a demand for accounting and payment, but as creating, or at least adding to, the obligation sought to be enforced.

To such a first paragraph only the general cause of demurrer that it did not state facts sufficient to constitute a cause of action, could be addressed. Its sufficiency as stating a cause of action would not be attacked or drawn in question by the special ground of demurrer that the cause of action depended upon the legislation of 1897, unless it could be said that the Act of March 4, which only related to the remedy, also affected the obligation sought to be enforced, and was relied upon by defendant in error for that purpose. The overruling of the demurrer would not assert as against the demurrant the validity of such legislation for any purpose whatever. It would not be involved in the decision, which would simply hold that the paragraph of complaint stated a cause of action wholly governed by the statutes of the State, and the principles of general jurisprudence, and upon the authority of the cases cited, the claim that any federal question had been decided adversely to the demurrant could not be sustained. But as to such other paragraph of complaint the special ground of demurrer that it asserted the validity of legislation which was invalid under the constitution of the United States would apply in full force, and a federal question would be presented, the decision of which could not be avoided because, unless the legislation was valid, the paragraph would not state a cause of action. The complainant's right of action would depend, as to that para-

graph, upon the validity of such legislation, which he was asserting and the defendant denying. If the demurrer were overruled and that ruling affirmed by the state supreme court, a federal question, reviewable in this court would undoubtedly be presented, but on the other hand, if the demurrer were sustained and that ruling affirmed in the state supreme court, the result would be that the cause of action attempted to be stated would be eliminated from the case, and the judgment rendered therein against the defendant would be based exclusively upon the other paragraph, and it could not be said that any federal question was presented. Now in this case, so far as the issue of law raised and decided upon the demurrer to the complaint is concerned, the result of the rulings of the trial court and state supreme court is precisely the same, even if it should be conceded, as it is not, that there is in the complaint an attempt by defendant in error to assert an obligation or right created or affected by the legislation of 1897. The trial court and state supreme court both ruled that the legislation of 1897 was invalid for any such purpose. The federal question was thus at the outset decided in favor of the plaintiff in error, and the defendant in error was compelled in all further proceedings in the action to rely for its sole foundation upon the contract obligation, if any, imposed upon the plaintiff in error by the Act of 1847 in its original form.

The trial court and state supreme court in holding, as they did upon the general ground of demurrer, that the facts stated in the complaint constituted a cause of action

under the Act of 1847; that the obligation created by that act was not affected by the change in the length of plaintiff in error's railroad, authorized, at its solicitation, by the Act of January 20, 1851, nor extinguished by the acceptance in 1873 of the general railroad law, as to rights acquired prior to such acceptance, did nothing more than to construe the statutes of the state and determine their scope and effect—and the rulings so made, and judgment entered against plaintiff in error as the result thereof, present no federal question and are not reviewable in this court. A federal question is not presented simply because the party litigant asserts that the claim made against him by his adversary depends upon the assertion, or involves the denial, of some right secured to him by the constitution or laws of the United States. The record must affirmatively show such to be the fact.

Crowell v. Randall, 10 Pet. 368.

The assignment of errors, asserting the existence and decision against the plaintiff in error, of a federal question, counts for nothing, unless from the record itself the fact appears.

Fowler v. Lamson, 164 U. S. 252;
Clarke v. McDade, 165 U. S. 168;
Walker v. Villavaso, 6 Wall. 124.

It is, however, shown by the record in this case, in addition to what the complaint itself shows as to its proceeding exclusively upon an obligation created by the Act of 1847, in its original form, and to the fact that by the ruling on the demurrer the defendant was confined to this

theory, that the defendant in error, upon the argument of the demurrer, stated its contention to be that the obligation sought to be enforced was one created by section 23 of the Act of 1847, and made no claim that such obligation was created by, or depended to any extent upon, the legislation of 1897.

See opinion of the trial court (record, pp. 37-38), where the contentions of both parties are stated.

The next issue of law determined in the case was by the ruling of the trial court in sustaining the demurrer of defendant in error to the second paragraph of answer. Not a single question was presented by this answer of a federal character. It was bad upon demurrer for the reason, if no other, that it stated only one fact which did not appear in the complaint, and that was its denial that plaintiff in error was indebted to the defendant in error in any sum when in 1873 it accepted the general railroad law and surrendered its special charter. The general denial had already been pleaded as the first paragraph of answer. The complaint averred that the moneys sued for were owing at and before the acceptance of the general railroad law, and under the first paragraph of answer, that, as well as all other material allegations of the complaint, was denied. So that the denial contained in the second paragraph of answer was unnecessary and, so far as it was concerned, the sustaining of the demurrer worked no harm to defendant in error, and was not error.

Board v. State, ex rel., 148 Ind. 675;
Watson v. Lecklider, 147 Ind. 395;
Jeffersonville, etc., Co. v. Riter, 146 Ind. 521.

The only other matters stated in the answer were already stated in the complaint, to wit: that by the Act of January 20, 1851, plaintiff in error had been permitted to shorten its railroad by leaving out the part between Indianapolis and Richmond, and had only constructed and operated the remaining part, and that on the 17th of January 1873, plaintiff in error had accepted the general railroad law and surrendered its special charter. It was charged that the effect of these things—either or both—was to release and extinguish the contract obligation imposed by the 23d section of the special charter, and the answer then proceeded to aver that the defendant in error by its complaint was asserting a right of action created by the legislation of 1897. Now it is too plain for argument that the nature of the right asserted by the defendant in error in the complaint must be determined solely by reference to the complaint itself. This the court had been challenged to do by the demurrer which had been filed to the complaint, and upon that demurrer it had been determined by the trial court, rightly, as afterwards decided by the state supreme court in affirming the ruling, not only that the contract obligation under the Act of 1847 had not been released or extinguished by reason of the matters stated in the answer, and which as we have seen were stated in the complaint, but that the defendant in error was not asserting that such had not been the effect by reason of anything contained in the legislation of 1897; so that the answer, in so far as it presents a federal question, only does so upon the theory that the plaintiff in error

has the right, in spite of defendant in error's disclaimer of any reliance upon the legislation of 1897, and in spite of the decision of the court that defendant in error did not, and could not, rely upon such legislation, to put the defendant in error in the position of so relying, by alleging the fact in a paragraph of answer. If this is permissible we submit that there is no case in which the judgment defendant may not make up the record so as to present a federal question for review in this court.

There was clearly no federal question determined by the ruling upon the demurrer to this paragraph of answer. It simply required the court to again determine by reference to the complaint, what was the source of the obligation the defendant in error was seeking to enforce, and finding, as it already had, that it was not the legislation of 1897, but the Act of 1847, to construe the Act of January 20, 1851, and the provisions of the general railroad law of 1852, and especially of its 36th section, to determine whether the acceptance by plaintiff in error of the permission given by the Act of 1851 to shorten its railroad, and by the other Act to abandon the Act of 1847, released or extinguished existing obligations incurred under the latter act. In doing this the trial court and state supreme court were, in one view, simply construing a pleading, and in the other, state statutes, and in both cases applying principles of general jurisprudence not involving in the slightest degree any question of federal law.

The issue of law presented by the demurrer to the third paragraph of the answer was decided in favor of plaintiff

in error. The demurrer was overruled, and this ruling was not reversed by the supreme court of the state. The ruling was in harmony with the ruling upon the demurrer to the complaint, in which it was broadly held that no effect could be given to any of the legislation of 1897 to create, add to, or alter in any respect the obligations, if any, imposed upon plaintiff in error by the charter of 1847, or to deprive the plaintiff in error of any property or contract rights vested in him prior to the enactment of such legislation. The answer pleaded the judgment in the suit brought in 1875 as an adjudication of the cause of action stated in the pending complaint. It averred that the causes of action in both cases were the same, and that the judgment was upon the merits. It did not set out the complaint in the former action, or in any way aver or show that it did not allege that a demand had been made for an accounting and payment of the moneys sued for before the suit was brought. The court held that it was a good answer, and, as it went further and averred that the defendant in error was relying upon the legislation of 1897 to deprive plaintiff in error of the benefit of the judgment as a defense, it was in effect a holding that the judgment, admitted by the demurrer to be such as the answer alleged it to be, gave the plaintiff in error a vested interest which could not be affected by the legislation of 1897, and that in its application to such judgment, such legislation was invalid. The federal question presented was therefore decided in favor of plaintiff in error, and, of course, is not reviewable at its instance in this or any other court.

But plaintiff in error insists that the federal question presented by this paragraph of answer was decided adversely when its demurrer to the reply was overruled. The reply set out a copy of the complaint in the suit begun in 1875 showing that it contained no averment that a demand had been made for an accounting and payment of the moneys sued for, before the suit was brought, and in addition, it was alleged that the general assembly had not authorized such demand to be made until after the suit was decided, and that in fact no demand had been made before the suit was begun. It went further and disclaimed any reliance upon the legislation of 1897 to deprive the plaintiff in error of any benefit he was entitled to under said judgment, and asserted that only the Act of March 4 was relied upon for any purpose, and that only as providing for the making of a demand. The overruling of the demurrer decided nothing but that the right of action to recover moneys claimed to be owing under the Act of 1847 did not mature until a demand was made, and that a judgment rendered upon sustaining a demurrer to a complaint for the recovery of such moneys, which did not aver or show a demand, was not a bar to another action in which a demand was averred. In the first stage the construction of the Act of 1847 was involved, and this did not present a federal question, and in the next stage the scope and effect of a judgment as an estoppel was involved. And again no federal question was presented as this court has expressly held.

California v. Hollady, 159 U. S. 674.

Did the Act of March 4, 1897, in providing that the attorney-general should demand of plaintiff in error an accounting and payment of the moneys claimed to be owing to the state, under the Act of 1847, add anything to the pre-existing obligation of plaintiff in error, or was it merely declaratory of the common law right of defendant in error to make the demand to which it related, or remedial in its nature?

It needs no argument or citation of authorities to show that if it was merely declaratory of the common law, it did not deprive plaintiff in error of any rights secured to him by the constitution of the United States, nor if it was merely remedial, that it did not impair the contract obligation imposed upon plaintiff in error by the Act of 1847, or deprive him of any vested property right, or take his property without due process of law, in violation of the constitution of the United States. There is no vested right in a remedy. The remedy for the enforcement of a contract is not part of the obligation of the contract, protected from impairment by subsequent legislation, except to the extent that on the one hand the existing remedies may not be taken away or so changed as not to leave the obligee a reasonably efficient remedy, or on the other hand so increased as to give the obligee more than the contract contemplates. Within these limits state legislation relating to matters of remedy does not impair the obligations of contracts.

Cooley, Constitutional Limitations, 346-357.

This author says, at page 356, that where "a legal impediment exists to the enforcement of a contract which

parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would perfect and enforce it."

In the present case the 23d section of the Act of 1847 requires that there must be a demand for an accounting before the right of action has accrued. It is provided that reports of expenditures, expenses and profits shall be made when requested by the general assembly, and until such request is made, plainly an action to recover the moneys provided to be accounted for and paid, could not be maintained. The contract itself contemplates that the request may be made at the pleasure of the legislature, and as it can only express its will by legislation, and act by agents, it necessarily follows that the right of the legislature to pass an act providing for the making of a demand, and designating the officer or agent by whom it shall be made, is a part of the contract obligation, and that such an act does not impair, but perfects and enforces such obligation.

Ogden v. Saunders, 12 Wheat. 213;
Been v. Haughton, 9 Peters 329;
Tennessee v. Speed, 96 U. S. 69.

In Chicago, etc., R. Co. v. State, ex rel. 153 Ind. 135, the state had failed in a former suit to recover a franchise tax imposed upon the filing by corporations of their articles of association or agreements of consolidation as a condition precedent to incorporation, in the case of domestic corporations, and to the right to do business

within the state in the case of foreign corporations, and to the taking effect of railroad consolidations made under existing laws of the state, upon the ground that the consolidation agreement in question had not in fact been filed before the suit was brought. Thereupon an act was passed requiring all consolidation agreements to be filed, and providing for the bringing of suit to enforce such filing and to recover the franchise tax. To a suit so brought it was objected that the act was unconstitutional as impairing the contract right to consolidate, and that the judgment in the former suit was a bar to the prosecution of the second suit, but it was held that the act related only to the remedy, and that the judgment in the former action was not a bar to the second.

On the point as to the validity of the Act of March 4, 1897, the case is directly in point in the present case.

It is, however, contended by counsel for plaintiff in error that a federal question is presented by the rulings of the court below which we have so far considered, because in every case where it is claimed a federal question is involved, and has been decided adversely to the plaintiff in error, it is the right and duty of this court to pass upon every element entering into the question, including the construction of the prior state legislation the obligation of which as a contract it is claimed has been impaired by subsequent legislation, in order to determine for itself the obligation of the pre-existing contract, and thus be enabled to see whether the subsequent legislation does impair such obligation; and that upon this inquiry, this court is not to be concluded by the decision of the state court by which

the contract is so construed as that its obligation is not impaired by the subsequent legislation. In support of this contention, Citizens Bank v. Parker, 192 U. S. 73-85, and Yazoo & Mississippi R. R. Co. v. Adams, 180 U. S. 41-44, are cited.

Neither of these case is applicable to the case at bar. The fundamental distinction, which is ignored by plaintiff in error, is that in Bank v. Parker, the right to collect the license tax, for the recovery of which the suit against the bank was brought, had no existence except as it was created by the later act, which it was claimed deprived the plaintiff in error of an immunity from taxation secured to it by the prior act under which it was incorporated. It was the later act that was sued upon and asserted by the defendant in error as the foundation of its right to collect the tax. Without that act the defendant in error had no standing in court at all. It asserted the validity of the act. The plaintiff in error set up as its defense its alleged contract right, by virtue of its charter, to be exempt from payment of the tax, and asserted that the act relied upon by the defendant in error was invalid under the constitution as impairing the obligation of the contract. The trial court sustained the defense and held that the action could not be maintained as the act upon which it was founded was invalid. The state supreme court reversed this decision, holding that the charter of the plaintiff in error only exempted it from property taxation and not from license taxation. It was upon this state of facts that it was held by this court that it was not concluded by the construction thus placed upon the charter contract, and certainly no

other decision could have been made unless the court was prepared to abdicate its function of reviewing the decisions of the state courts upon federal questions.

But in the case at bar the defendant in error does not declare upon the acts which are claimed to impair the obligation of the contract created by the charter of 1847. It declares upon that charter itself, and at every stage of the case has disclaimed, instead of asserted, the validity of the legislation of 1897 to create any right in its favor, or impose any new obligation upon the plaintiff in error, and the state courts, from the inception of the litigation, have treated the case as proceeding upon this theory, and have held the legislation of 1897 to be invalid. It is the plaintiff in error, and not the defendant, that brings this subsequent legislation into the case. If it had not done so it would not have been heard of.

In such a case this court has no basis for entering upon the question of the construction of the Act of 1847, the conditions precedent to its right to review being that the judgment rendered against the plaintiff in error depends upon the validity of an act relied upon by the defendant in error as being valid, and asserted by the plaintiff in error to be invalid because it violates the constitution of the United States in depriving it of rights secured thereby; and that such act has been held to be valid by the state court. In the case at bar every element essential to the jurisdiction of this court is absent. In the case of Bank v. Parker every such element was present.

In Yazoo, etc., R. Co. v. Adams, 180 U. S. 41, it is said that there is no doubt of the general proposition that where a contract is alleged to have been impaired by sub-

sequent legislation, this court will put its own construction upon the contract, though it may differ from that of the supreme court of the state; but by this it was not meant that the jurisdiction of this court could be invoked where the subsequent legislation was not relied upon by the defendant in error, either to create a right in himself against the plaintiff in error, or to deprive the latter of rights that he would otherwise have, and where the defendant in error and the state courts have in all stages of the controversy recognized the invalidity of the subsequent legislation for any such purpose.

In that case the court declined to take jurisdiction, holding that "If jurisdiction in this case is sustained, it results that whenever a state court gives a certain construction to a contract, it is our duty to search the subsequent statutes and to find out whether there be one which, under a different construction of the contract, may be held to impair it. We must decline the obligation."

So in this case the fact that the plaintiff in error, in its anxiety to get to this court, has itself searched for subsequent legislation which, under a different construction of the act of 1847 than that given to it by the state court, may be held to impair the obligation of that act, does not confer jurisdiction upon this court to construe the act of 1847, unless the defendant in error has relied upon such subsequent legislation as creating its cause of action, or as depriving the plaintiff of a defense, and unless it has been given such effect by the state court.

This court has very properly held that it is not bound to pursue phantoms.

It is further insisted by plaintiff in error that the act of March 4, 1897, was given effect by the state supreme court to create a right of action, because it is said that it was held by that court that there was no right of action except such as was created by that act. Certain extracts from the opinion of the court are quoted as sustaining the contention. The fact is that every expression so quoted was used in a connection which unmistakably shows that what the court had in mind to say, and, in fact, did say, was that until the making of the demand for an accounting and payment was authorized by the act of March 4, and until the demand so authorized had actually been made, the pre-existing cause of action in favor of defendant in error under the provisions of the act of 1847 had not matured. All that was said was in reference to the proposition that the suit begun in 1875 was not a bar to the present action, because it was prematurely brought in the absence of a demand authorized and made, whereas the present action was timely, inasmuch as it was instituted after demand had been authorized and made.

There is not an intimation in the opinion of the court below that the legislation of 1897 had any effect to create any new obligation, or deprive plaintiff in error of any vested right. It was held to be invalid in every respect except in so far as it related to the remedy for the enforcement of the contract of 1847.

It is also insisted that effect was given to the legislation of 1897 in determining the elements that entered into the accounting made by the trial court which resulted in the judgment that was affirmed by the state supreme court.

It is apparent that there is nothing in this contention. The trial court put its own construction upon the act of 1847 as to its requirements in reference to the accounting, and applied in making the accounting, the construction it determined to be the true one. Neither the defendant in error, nor the court, asserted that the legislation of 1897 had any validity as affecting the construction of the act of 1847 in this respect, and for the reasons already given no federal question arises in this connection.

We have so far presented the case in the belief that it does not present any substantial federal question, and that the motion filed by defendant in error to dismiss or affirm for that reason should be sustained by the court. We ask that what is said in this brief be considered in connection with the brief filed in support of the motion to dismiss or affirm.

If, however, the court should be of opinion that a federal question is so involved and presented as to make it the duty of the court to review the decision of the court below as to the construction of the legislation involved, antecedent to that of 1897, in order to determine whether the judgment of the court depends upon the legislation of 1897, to such an extent that the obligation of the contract of 1847 has been impaired, or the plaintiff in error deprived of any vested property or contract rights, then we respectfully submit in support of the rulings of the court below to which objection is made in plaintiff in error's brief, the following argument and authorities, upon which, in connection with the reasons and authorities contained in the opinion of the court below, we ask that the judgment of the court below be affirmed.

REGULATION OF TOLLS BY THE LEGISLATURE WAS NOT A CONDITION PRECEDENT TO THE OBLIGATION OF PLAINTIFF IN ERROR TO PAY ITS SURPLUS EARNINGS TO THE TREASURER OF STATE FOR THE USE OF THE COMMON SCHOOLS. SECTION 23 OF THE ACT OF 1847 LIMITED THE AMOUNT THAT PLAINTIFF IN ERROR SHOULD EVER APPROPRIATE IN PROFITS TO ITS OWN USE:

(a) TO THE REPAYMENT OF THE FULL SUM INVESTED, AND TEN PER CENTUM THEREON;

(b) AND THEREAFTER, TO FIFTEEN PER CENTUM PER ANNUM THEREON.

WHEN THESE SUMS WERE REALIZED, THE SURPLUS, IF ANY, AFTER THE PAYMENT OF THE EXPENSES, AND RESERVING SUCH PROPORTION AS MIGHT BE NECESSARY FOR FUTURE CONTINGENCIES, WAS PAYABLE TO THE TREASURER OF STATE FOR THE USE OF COMMON SCHOOLS, WITHOUT REFERENCE TO WHETHER THE STATE HAD TAKEN ACTION TO REGULATE THE TOLLS AND FREIGHTS OF THE COMPANY.

The cause of action alleged in the complaint arises on sections 22, 23 and 24 of the act of 1847, which we denominate plaintiff in error's charter. We here reproduce those sections, together with section 35, which, although it was repealed in 1848, is material to be considered in construing the other sections.

> Sec. 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road, or any part thereof, as shall be for the interest of said company, and to change, lower or raise, at pleasure: Provided, That the rates established

from time to time shall be posted in some conspicuous place or places on said road.

Sec. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested, and ten per cent. per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

Sec. 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses; and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper.

* * * * * * *

Sec. 35. The corporation shall cause to be kept a fair record of the whole expense of making and repairing said railroad, and of each section thereof, with all the incidental expenses, and also a fair account of the tolls received; and the state shall have the right to purchase the stock of said company at any time after twenty-five years, by paying to said corporation a sum of money which, together with the tolls received, shall equal the cost and expenses of said railroad as aforesaid, with an interest of ten per centum per annum; and the books of said company shall always be open for the inspection of any agent of the state, appointed for that purpose by the legislature, and upon any refusal to exhibit their books and accounts to said agent, upon request made to the president, all powers granted by this act shall cease. (Repealed.)

This action, then, is based upon the rights reserved to the state by sections 22, 23 and 24, as above set forth, and the contention here is, that the facts stated show a good cause of action under this statute; plaintiff in error contending that section 23 gave to the state no right to any of the profits of the corporation which might accrue prior to the regulation of tolls and freights by the legislature, and, the legislature never having regulated the tolls and freights, the time never arrived when the corporation was bound to pay any sum to the state for the benefit of common schools.

Our contention is, that section 23 limited the amount that the company should ever appropriate to its own use in profits:

1. To the full amount invested, and ten per centum per annum thereon, and thereafter, to fifteen per centum per annum upon the capital stock; and

2. That when they had so realized, out of the profits, the full sum invested, and ten per centum per annum thereon, the surplus profits, after the payment of fifteen per centum per annum upon the capital invested, and the expenses, and after reserving the necessary sum for future contingencies, should be paid to the treasurer of state for the use of the common schools.

CONSTRUCTION OF THE STATUTE.

The judicial construction of the statute is but a process for ascertaining the intention of the legislature. In looking for this intention we must consider, first, the conditions existing at the time. A railroad was a novelty. The cost of its construction and operation and the amount of business which would come to it were unknown. As an investment it might be highly profitable or very unprofitable. It was an object to the public to have it built; it was an object to the promoters to build it, provided they could make money out of it. Such a law always represents a bargain made between the state and the corporators.

We are bound to assume that the legislature was intending to promote the public interest in a true, large and permanent sense. The immediate want was a railroad. To get it was the first *desideratum;* to get it on terms presently and permanently advantageous to the state and people was the problem.

In such a case there are four interests to be considered, viz.: Those of the public in securing the railroad, or other improvement; those of the corporators in the matter of profits out of the enterprise; those of the people in the matter of charges for services rendered; and those of the state in the matter of compensation for franchise bestowed.

How to promote all these interests most equitably and advantageously is a matter to be solved in view of conditions existing. The enterprise may be so risky that men will not touch it without subsidies; it may be so inviting that they will bid fabulous sums for the franchise.

The legislation of Indiana, from its earliest history, is evidence of a determination on the part of the people to foster, by every means in their power, the development of highways of trade and commerce. By 1835 the Wabash & Erie canal was well under way, and in operation nearly or quite all the distance from the Ohio state line to Lafayette. In 1836 the great internal improvement act was passed, authorizing a number of public works, and among them a railroad from Madison to Lafayette, by way of Columbus, Indianapolis and Crawfordsville.

This was to connect the Wabash & Erie canal and the Ohio river. For its construction $1,300,000 was appropriated by the bill. It was in contemplation that the state should build, own and operate the road.

By 1842 it was evident that the state had undertaken more than could be accomplished. The act of that year contained a general offer to turn over the interest of the

state in its unfinished works to private corporations that would undertake to complete them. (Acts 1842, p. 3.) The Madison & Indianapolis railroad company was organized during the same year, and undertook the completion of that road from Madison to Indianapolis, and the work was surrendered to the company by the state in 1843. (Directors' Report, September 28, 1844, Indiana Pamphlets, vol. 1.)

The president's report in February, 1846, showed the road to be still incomplete, lacking thirty miles of reaching Indianapolis. (Ib.) It was probably completed during that year, and the act here under consideration passed a few months later. Ten years had elapsed since the work was undertaken and the appropriation made for its construction. Such had been the experience of the state in obtaining its first railroad.

Coincidently with these events the state formally gave up its internal improvement scheme, compromised its debts, and by the acts of 1846-7 turned the Wabash & Erie canal over to its creditors.

But the people were by no means disposed to give up their efforts to obtain the improvements, and the legislature set about to secure them by liberal inducements to private corporations. The act incorporating the plaintiff in error was one of a number passed with that end in view.

The most cursory reading of the act discloses that it had a purpose beyond the mere organization of a railroad company. It was framed with a view to offer such in-

ducements to the corporators to accept the charter and build the road as would afford the highest assurance of the accomplishment of those results. At the same time, it contained provisions manifestly intended to protect the people from extortion, limit the profits to be enjoyed by the company, and turn some revenue into the school fund.

For the purpose of construction we must consider the statute as it was enacted, including section thirty-five, afterwards repealed. It is to the act as it was passed, and its possible and probable operation in the various contingencies of the future which might arise, and which we may suppose the legislature had in mind, that we must look for the intention of the lawmakers.

It provided first for extremely liberal recompense to the stockholders for the cost and hazard of the undertaking. They were given absolute control of the corporation and its franchises, with power to fix tolls and charges at discretion until they had received a return of their capital and ten per cent. per annum thereon, unless, after the expiration of twenty-five years, the state should elect to purchase all the stock by paying what should at the time remain unpaid, if anything, of the capital and ten per cent. per annum.

Not only that, but the return to the stockholders of their capital and ten per cent. was not to extinguish their stock; but they were to be entitled to receive, after that, such dividends as the road would earn, not exceeding fifteen per cent. per annum on the capital.

These conditions, taken together, secured to the stockholders to the extent prescribed, in preference to any interest of the public in low charges, or any compensation to the state for the franchise, the benefit of all possible profits in the building and operation of the road.

The enterprise might prove highly profitable. The history of the times indicates that men generally took a sanguine view of the future, and especially of the future value of railroad property. It might be possible to obtain a return of the capital and ten per cent. in ten or fifteen years. The right of the company to obtain it as soon as possible was unquestionable. And the right to receive fifteen per cent. in dividends, after that point had been reached, until the expiration of twenty-five years, was also absolute.

The legal rate of interest at that time was six per cent. Certainly the law went to the limit of liberality in providing guarantees and inducements for the benefit of the stockholders.

We may consider next the provisions made for the interests of the people in the matter of charges.

The first was that in section thirty-five, that at the end of twenty-five years the state should have the right, at its option, to buy the stock. It would then have the subject of rates entirely within its own control. It could trust itself, and the people could trust it to do justice.

The second was, that in case the state did not see fit to buy the road, the legislature should have full control of rates after the stockholders had received, in dividends,

their capital and ten per cent. per annum, subject only to the right of the stockholders to receive dividends at the rate of not less than fifteen per cent. per annum.

The provision for compensation to the state for the franchise granted, was in the power reserved to regulate rates after the stockholders had received their capital and ten per cent. Whatever the road could make over fifteen per cent. on its cost, at rates prescribed by the legislature, was to go to the school fund.

What would come of all this no one could tell. It was to the manifest interest of the stockholders to get back their capital and ten per cent. as soon as possible, and begin the enjoyment of dividends at fifteen per cent. It was assumable that the company would fix its rates of tolls and freights with a view to making the largest possible amount of money out of the public, and that this might exceed fifteen per cent. on the cost of the road by an unknown amount.

The time when occasion would arise, if ever, for the state to exercise the power of regulation reserved, was indefinitely far away in the future. The act contained no limitation upon the life of the corporation. By its terms the company was allowed five years within which to begin work, and fifteen years from its commencement within which to finish the road. The company was given full control until the repayment of its cost and ten per cent. per annum in dividends. So that it was quite within the contemplation of the act that fifty years might elapse before the state would have any occasion to act in relation to the regulation of tolls and freights.

When it came, it would be for the legislature to judge whether to exercise its power of regulation with a view to keeping down rates, or with a view to obtaining revenue for the school fund. There is a vaguely definable standard of reasonable charges for railroad freights and fares, to which both the company and the state would be bound to give some heed. What that standard would be, forty or fifty years later, was not foreseeable in 1847. To exceed that rate for the sake of revenue would not only be an act of injustice on the part of the state, but a policy likely to defeat its own purpose.

On the other hand, there could be no good reason why the patrons of this railroad should pay less than a reasonable compensation for the use of it. In such a matter as that, the people of the state ought all to be treated alike, as nearly as possible. There would be gross injustice in a law providing that the farmers in one direction from Indianapolis should have less rates to the city on their produce than those in another direction. It must be taken as assumed in the act that the legislature, if it ever enacted any regulation of tolls, would do so with reference to the general and prevailing charges for such service in the state and country.

Upon the basis of such rates the contemplated railroad might never earn, net, fifteen per cent. per annum on the capital invested in it; or it might earn twice that per cent., or more at one time, and less at another.

There was, therefore, manifest wisdom in leaving open, as far as possible, the question of what the state would

do in the exercise of its power of regulation. And it *was* left wide open, with the single exception that the company should be entitled to retain out of the net profits fifteen per cent. per annum, with a reserve for contingencies.

The language of the act is, that "The legislature may so regulate the tolls and freights that not more than fifteen per cent. per annum shall be divided on the capital employed." The state was at liberty to regulate, or not, when the time came. We can hardly say that the word "may" was intended to be mandatory, as it sometimes is, where it is used to confer a power, in the exercise of which others are interested. The reasons for leaving the matter thus wholly at the will of the legislature are obvious. It was not known what the profits of the company's business would be. They might be insufficient to pay fifteen per cent. on the capital employed. The company could be depended upon to make all it could out of the property. Until it could make the fifteen per cent. which it was entitled to receive and retain, there was no occasion for the legislature to interfere. That condition might be long in coming, and come at last, or it might never come.

The possibility of compensation to the state for the franchise lay in the fact that the road might be able to earn, at some time in the future, after paying the stockholders their capital and ten per cent., a surplus over the profit necessary to pay dividends at fifteen per cent., while yet operating at reasonable rates of fares and freights.

All the provisions of the act point to that possibility

as a thing present in the mind of the legislature. It was to save for the state the benefit of that possibility that final, discretionary and untrammeled control of tolls and freights was reserved to the legislature.

It was to that end that the grant of the franchise was not absolute, but revocable at the will of the state after twenty-five years. It was, in effect, permission to use the franchise for twenty-five years, with right in the state to resume its own at the end of that time.

If, when that time arrived, the stockholders had already received their capital and interest in dividends, there would be nothing for the state to pay. It would be entitled to call on the stockholders to assign their stock to it as its own. Their interest in the property would be at an end.

If, after that, the state should see fit to let them remain in possession of the road and receive their dividends, it would be by mere sufferance. They would be mere bailees of the stock. Their management of the road would be as agents or servants of the state.

What is the explanation of these singular provisions? Why was the company given such arbitrary and unlimited power to begin with, and none at all, except to be mere custodian of the property, at the end? Was it merely to protect the people in the matter of rates?

They would never need that protection more than right then. They were as poor then as they ever expected to be. And yet, the act turned them over to the tender mercies of the company for twenty-five years, or until the stockholders had received back their capital and interest, if that should happen sooner.

Why did the legislators thus deal with their constituents? It was not a natural thing to do. The voter of today is the man toward whom a public officer's sympathies go out most actively; not the citizen of half a century later.

The key to it all is simple enough. The legislature was not free to do just as it would. It had to do the best it could. The scheme for public improvements by the state had broken down. Private capital must be enlisted by liberal offers. And the best offer to make was one that would promise the investors the speediest return of their money, and to that end give them the most absolute control of the property out of which it was to be made.

Only when that had been accomplished could other interests be provided for. The first of these was the interest of the people in reasonable charges; the next, recompense to the state for the grant of the franchise.

These considerations seem to us to develop the intention of the legislature along clear lines. Whatever powers it reserved to itself were to be exercised for the public good, and the good of the whole public when the time came. It was intending to do justice alike to stockholders, shippers, travelers, consumers and school children. It was intending to turn some profit from the franchise into the public treasury, if it could do so consistently with this justice.

It was impossible to do that at once. It was not certain that it could ever be done. The time might never come when the road could pay the profit to its builders which must be authorized in their favor to induce them to undertake it, do business for the people at fair rates, and pay a surplus into the treasury.

On the other hand, it might come. Conditions were conceivable and not impossible, in which, after doing justice alike to stockholders and patrons, there would be a surplus of profits. To make sure of them in recompense for the franchise was the ultimate, underlying intent of the provisions of the act which we have been considering. The motive which prompted them was not benefit to the stockholders, nor cheap travel and transportation, but revenue for the schools—revenue not to be realized immediately—perhaps never—but not to be lost if the conditions of its realization should arise.

To get the road was the first thing. To get even a promise of this the charter must be acceptable to the stockholders. We are to presume that this was the subject of negotiation between the promoters and the legislature, or its committee. Such provisions as were necessary to secure them in their outlay must necessarily be embodied in positive and unmistakable terms in the act. Investors want to know their rights before they pay their money. Hence the complete surrender by the state of all power of regulation or control over the company until its stockholders had taken back their money and interest.

All beyond this was in the dark. With these conditions to be met, time only would show what would be possible in the way of rates to the people, or revenue to the state. All that could be done was to vest in the legislature power to deal with the questions when they came.

Through all these provisions one intent stands out clearest and most unmistakable of all. It is that the company

shall never, in any event, appropriate to its own use in profits more than fifteen per cent. per annum on the capital invested.

To this main intent (next to that to secure the road) all lesser intents were contributory. It was for this that the company was empowered to take back its capital as quickly as possible. It was for this that the directors were commanded, in section 24, to declare dividends. It was not necessary to put that authority in the imperative mood to secure the ordinary performance of that ordinary duty. It was to secure the reimbursement of the stockholders by preventing the expenditure of the earnings in other ways, and so to bring about the contingency upon which the state was to resume its lawful sovereignty over the corporation in the right to regulate its tolls and freights.

The irrevocable right conferred to take fifteen per cent. after reimbursement of capital negatives a right to take more. The whole scheme—the provisions for quick return of capital at whatever hardship to the public in the way of charges; the indefeasible right to fifteen per cent. as long as the road should remain in the hands of the stockholders, all import that fifteen per cent. was to be the limit.

The intent of the law is the law. The company accepted its charter *cum onere*. It was bound by its intent as closely as by the letter. The intent of the law was that the company should not receive for its own use unlimited profits. The acceptance of the charter by the com-

pany was an agreement on its part that it would not collect and appropriate to its own use unlimited profits. The limit was fifteen per cent.

If the company had obeyed the law, according to its manifest intent, it would have distributed all its net income as dividends until the stockholders had received their money and ten per cent. If it had then reported that fact to the legislature, it would have been in order for that body to act. It would have been within its discretion to approve and continue the schedule of fares and freights previously adopted by the company, or form a new one. In either case, the net profit exceeding fifteen per cent. would have been payable to the school fund.

But suppose the legislature had not acted, and the company had gone on under its former schedule of fares and freights, and made more than fifteen per cent. net profits. Would it have been entitled to keep the surplus, as against a subsequent demand by the state? It was certainly lawful for the company to fix its own rates until the state prescribed others. And the money which it made was its own, unless the law divested or qualified its title to it.

While it was the intention of the law that the company should not collect and appropriate to its own use in dividends net profits exceeding fifteen per cent. per annum after the stockholders had received back their capital and ten per cent., it was part of the same intention that more than fifteen per cent. profits should be earned and collected, if it could be done upon a just basis of rates.

This intention is manifest in all the provisions of the

act. It is certain that the legislature had the subject of rates in mind. It expressly gave up its control of them until the company should be able to get back its capital, and in order that it might get it back. And it expressly provided that that control might be resumed by it again, when that had been accomplished. And lest that plan might not work well, it reserved a power of purchase after twenty-five years.

With the first object attained—the road built and in operation; and the second object attained—the stockholders reimbursed their capital and interest, the third object was to see that the people were charged fair rates.

If, when the time came at which the legislature was entitled to fix rates, the schedule of rates already in force by the act of the company was a fair one, there would be no occasion for the legislature to do anything. It was not to control rates for the mere sake of controlling them that the power was reserved; it was to enable the legislature to see that they were just.

Nor was it for the sake merely of low rates; it was for the sake of fair rates. As already pointed out, it was impossible for any one to know in 1847 what would be fair rates a quarter or a half century later. It was likely, even then, that the railroad would revolutionize commerce and transportation. It was to be surmised, even then, that economic forces beyond the control of laws or legislatures would control the general course of rates for transportation, as well as the prices of commodities. The people who would use this railroad would be entitled to use

it upon terms that were fair by comparison with the rates for railway service over the country at large.

Pursuing the supposition just stated, if the company had reported to the legislature that it had repaid to the stockholders their capital and ten per cent., and was deriving from the road profits just sufficient to pay dividends at fifteen per cent. upon a basis of rates in harmony with those prevailing over the country generally, what would there have been for the legislature to do? Nothing.

The first object—the road—would have been attained. The second object—the reimbursement of the stockholders—would have been attained. The third object—the payment of dividends at fifteen per cent.—would have been attained so far, and in harmony with the desired condition of fair rates. The final object—the revenue for the school fund—would have proved, so far, unattainable.

And so long as that condition of things continued, though it should be for a century, there would be nothing for the legislature to do. All the ends of the law would have been accomplished, so far as possible, from year to year.

But if the time ever came, no matter how many years afterwards, when the profits exceeded fifteen per cent., the right of the legislature to act would take instant effect. It would be for it then to say whether the rates should be reduced so as to bring the net profits down to fifteen per cent., or retained, and the surplus paid to the school fund. The law would then have worked out its logical and complete end. All its objects would have been satisfied at last.

If in that case the company, without any action by the legislature, had gone forward with its business upon the basis of rates established by itself, and made profits in excess of the amount necessary to pay dividends at fifteen per cent., would the right to the surplus have been in it, or the state?

It would have been money lawfully collected—collected in accordance with the right of the company and the purpose of the law, but money which the company had no right to keep; money which the law had been looking forward to through all the years following its enactment; money consecrated to the school fund when the foundations of the corporate structure were laid in the act of 1847. Such a situation creates a trust—money received by right, but which the recipient has no right to retain to his own use.

If the company, after repaying the capital and interest, and dividends at fifteen per cent., found itself in possession of a surplus of profits, and if, under the law, it held that surplus in trust for the state, there was an implied duty resting upon it to report that fact. And if it omitted to do so, it could not set up the delay of the legislature to demand a report as a relinquishment of its right to make such a demand at a later period.

We have carried the argument forward through this series of suppositions because that seems to us to be the best way to exhibit the intent of the legislature. If each step in the evolution of the undertaking had worked out in order, according to the manifest intent of the law, to

a given point, we can say with considerable assurance of certainty what would have been within the contemplation of that intention as the next step.

Suppose that the business had actually proceeded in that way; that the company, pursuing the spirit and intent of the law, had built the road, reimbursed its stockholders, paid a year's dividends at fifteen per cent., and reported a surplus in its hands. Upon what ground could it have contested the right of the legislature to direct its payment into the school fund?

Would it be said that the profits had not been earned under a tariff of charges enacted by the legislature, but under one established by the company itself? But if the tariff established by the company was a fair one, why should the legislature change it? And if there were no occasion to change it in the interest of fairness, what could the legislature do? Go through the mummery of enacting by law the same rate of charges already lawfully established by the company?

Would the legislature, by an empty form of regulation consisting merely of adopting the company's schedule, acquire a right to surplus profits which it would not have if the same profits had been made on the same business transacted at the same rates without interference by the legislature? Such a distinction seems absurd.

It is impossible to deny that, if the time had arrived when by the terms of the act the legislature was entitled to regulate rates, and the legislature, in pursuance of the power therein reserved, had regulated them, and a

surplus of profits had resulted, it would have been the right of the legislature to direct its payment to the school fund. It was equally within the power of the legislature to increase or to diminish the rates previously established by the company; or to adopt them without change. We can not impute to the legislature any purpose in taking the control of rates out of the hands of the company except to make them fair. And if, when its right to control them accrued, it found those existing by the act of the company fair, it would be guilty of wrong to change them.

As already pointed out, it is not to be assumed that it would be the wish or the duty of the legislature to require the company to do business at the lowest rates under which it could make fifteen per cent. net profit. No one foreknew what advantages this railroad might have. The growth of the three cities to be joined by it—Terre Haute, Indianapolis and Richmond—the course of prices and cost of railroad building in the future, might make it possible for this road to do business at less than the rates current generally through the state and country, and yet pay its authorized dividends with a surplus over. Would it be fair for the legislature to compel by law an inequality of charges against the people for the same kind of service, for the express purpose of preventing the school fund from deriving revenue from the company's business?

It seems to us, therefore, that we are driven to this alternative: It was either the duty of the legislature to interfere in the matter of rates only when and as it was necessary to do so, in order to preserve their fairness

(subject to the company's right to make fifteen per cent.), and then let the matter of profits take care of itself and produce a revenue for the school fund if it would, or none if it would not; or else it was its duty to watch the course of business and prevent the accruing of revenue to the school fund by reducing rates when necessary for that purpose, without regard to the necessity, justice, or fairness of the reduction toward the public generally.

There does not seem to us to be anything in the act, or the attending circumstances, or the general course of such legislation in the country at the time, or in the demands of justice, to justify the imputation of such an absurd intention to the legislature. It interprets the act to mean that the school fund was to serve the mere purpose of a slopjar to receive such driblets of surplus revenue as the legislature should be unable to prevent from accruing, notwithstanding its best efforts to do so.

No less absurd is the contention that the legislature could acquire the right to direct the payment of surplus profits to the school fund only by first establishing rates. Such a construction ignores the existence and justice of such a thing as fair rates, and sets up an artificial distinction between legislative rates and company rates. It is to the effect that surplus profits made on the basis of legislative rates would belong to the school fund; but the same profits made on the basis of company rates would belong to the company, although the company's rates might be absolutely fair.

Will it be seriously argued that the legislature, having

no right to turn surplus profits made on company rates into the school fund, could acquire such a right by a merely nominal change in rates—a change just sufficient to make it possible to say that the legislature had established a schedule? Such a performance would seem like child's play rather than man's work.

It was common, at the time, to require railroad corporations to contribute to the public revenue in consideration of the franchise bestowed. To construe this act to embody that intention in provisions which were to come into effect only in case such contribution should arise from the business of the company transacted at fair rates —rates approved, adopted, or changed by the legislature as might be necessary to make and keep them fair, is consistent with its language, with the spirit of the time, with the attending circumstances, and with plain, simple justice to all persons and interests concerned.

It is not material to this discussion whether the legislature expected that the revenue to the school fund would be large or small, regular or irregular; nor is it material what the fact would have been in that regard if the intent of the law had been carried into effect. The law provided with equal certainty for all magnitudes of surplus—little or great. It did not permit the company to keep any—no matter how small, nor how great.

The legislature never took any action on the subject of rates. A reason for that is given in the allegations of the complaint in respect to the conduct of the company. If no such reason existed, it would be presumed that the

legislature omitted to interfere because there was no occasion for its interference—because the company's rates were fair.

It does not lie in the mouth of the company to say that it charged and collected unfair rates, and made by that means a surplus of profits which it proposes to keep because it was made by means of unfair rates. It must be assumed in this discussion that the rates charged, and on the basis of which the profits alleged in the complaint were made, were such as were usual. If so, there was no occasion for the legislature to change them, and it is to be presumed that it would not have changed them if it had taken the matter in hand.

If these reasonings are sound, it follows that it was within the intent of the law of 1847, as enacted:

First, to secure the building and operation of the road;

Second, to return to the stockholders their invested capital and interest;

Third, to secure to the people the use of the road at fair rates (by legislative intervention and regulation if necessary), subject to the right reserved to the company to make fifteen per cent. dividends out of it; and

Fourth, to devote such surplus revenue as there might be after satisfying all these conditions, to the use of common schools.

That intent was not altered or affected by the repeal of section thirty-five. That repeal was the mere surrender of an option on the part of the state to purchase the company's stock.

The law imposed a duty on the company which it could not evade by any formality of proceeding. If it made profits which it could divide in dividends, it was its duty to divide them accordingly. If, instead of performing that duty, it made some other disposition of the money which inured to the benefit of the stockholders, such disposition of it was the equivalent of a distribution in dividends under the act.

If that course of business continued until an amount of profits had been earned which would have reimbursed the stockholders their capital and interest if it had been distributed in dividends, they were reimbursed within the meaning and purpose of the law. They can not be heard to say that they were not. The money was in their own hands. If they chose to invest it for their collective use instead of distributing it for their individual use, such investment was the equivalent of distribution for the purposes of the law.

The legislature then became entitled to regulate rates, and the school fund entitled to the surplus profits. It is to be presumed that if the legislature had known the facts it would have regulated rates, if they needed regu lation; if the rates established by the company were just and fair it would have let them alone. If any profits had been made over the amount necessary to pay dividends at fifteen per cent. on the capital invested, the legislature would have demanded its payment into the treasury for benefit of common schools.

According to the allegations of the complaint, the com-

pany made net profits sufficient to repay the capital invested and ten per cent.; but instead of distributing it among the stockholders as dividends, invested it for their benefit in the name of the company in divers ways. After that it made net profits sufficient to pay dividends on the capital invested at fifteen per cent. and a large surplus over. A large part of these also it invested in divers ways for the benefit of the stockholders, instead of distributing the same in dividends.

So that the stockholders never received, as dividends, the sums which they were entitled to receive under the terms of the act, before any surplus profits would be coming to the school fund. But they received in other forms amounts which might have been distributed as dividends, and which would have paid them all the dividends authorized by the law, and would have left a large surplus for the use of the school fund under its terms.

And this, it is averred in the complaint and admitted by the demurrer, was done for the express purpose of deceiving and misleading the legislature; for the purpose of making it appear on the face of the business that conditions prescribed in the law upon which surplus profits would be payable to the school fund did not exist, and so preventing any demand therefor by the legislature.

Surely it need not be argued that the company could not evade its just obligations to the state by any such contrivances as these. Every dollar which came to the hands of the company under such circumstances that it was accountable for it to the school fund upon the de-

mand of the state, remained subject to that charge through all transmutations of bookkeeping and metamorphoses of form.

In a substantial sense, if not in a literal one, all surplus profits received by the company after the amount collected was sufficient, if it had been applied as contemplated by the act, for the repayment of capital and interest, and the payment of fifteen per cent. dividends, were held in trust for the school fund upon demand of the state. An effort to escape from such a liability only fastens it the more irremovably upon the delinquent trustee.

These conclusions derived from the provisions of the act alone are in entire harmony with the principles applicable to the general construction of the powers of corporations. We have become so accustomed of late years to the free and easy assumption by corporations of all the rights and privileges of individuals, and more, besides, that we are liable to forget that they are mere creatures of law and have no powers except those expressly granted or indispensably necessary to the exercise of those expressly granted. But that old rule is still the law; and it is one of the fundamental principles to which it is wholesome to recur occasionally. The cases which illustrate it are so numerous that a few samples will suffice. We take for example the vigorous language of Black, C. J., in Commonwealth v. Erie & N. E. Railroad Company, 27 Pa. St. 339, quoted from page 351:

> "This case requires us to give a construction to the charter of a private corporation. The fre-

quency of such cases excites some surprise, when we reflect that an act of incorporation is and always must be interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation it may do; beyond that all its acts are illegal. And the power must be given in plain words, or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the Attorney-General, or anybody else, should complain against a company that keeps itself within bounds, which are always thus clearly marked, and equally strange that a company which has happened to transgress them should come before us with the faintest hope of being sustained. In such cases, ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them.

"Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because whatever is doubtful is decisively against the corporation."

In Holyoke Co. v. Lyman, 82 U. S. 500-511-12, Justice Clifford states the rule, as follows:

"Repeated decisions of this court have established the rule that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in

> favor of the public, and that nothing passes but what is granted in clear and explicit terms. Whatever is not unequivocally granted in such acts is taken to have been withheld, as all acts of incorporation, and acts extending the privileges of corporate bodies are to be taken most strongly against the corporations."

In Stourbridge Canal Co. v. Wheeley, 2 B. and Ad. 792, it is said:

> "The canal having been made under the provisions of an act of parliament, the rights of the plaintiff (the company) are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this—that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act."

This statement of the law is quoted in 4 Thompson on Corporations, sec. 5661, with approval, and the statement that it "has been frequently referred to with approbation."

In the very recent case of Covington, etc. Turnpike Co. v. Sandford, 164 U. S. 578, the controversy arose upon a statute of Kentucky, limiting tolls on a specified portion of the Covington and Lexington turnpike. A former corporation was chartered in 1834 to build the entire line from Covington to Lexington. By an amendment of the act it

was provided that in a contingency stated, the legislature should be entitled to reduce the rates so that the dividends should amount to fourteen per cent. and no more. Afterward, the franchises of the original corporation passed to two new corporations, between which the road was divided in two portions. The act in controversy reduced rates on one of those portions. The opinion was by Justice Harlan, and in the course of it he said, page 585:

> "Whatever authority, therefore, the general assembly had by statute to regulate the tolls of the plaintiff in error arose from its general power to regulate the affairs of a corporation, which came into existence by its authority, and which owned and controlled a highway established for public use.
>
> "Was the Covington and Lexington Turnpike Road company entitled, under its charter, to be exempt from legislation that would prevent it from earning at least fourteen per cent. 'upon the capital stock expended upon said road and its repairs,' as prescribed in the act of 1834?"
>
> * * * * * * *
>
> "The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislature intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable inter-

pretation of its statutes. It is as vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of 'the powers, rights and capacities' granted to the corporation of 1834, the legislature intended to exempt the new corporation, as it did the original one, from all legislation that would prevent them from earning as much as fourteen per cent. on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate and ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted."

The court below, in passing upon the sufficiency of the complaint in its opinion beginning on page 656 of the record, said upon this question:

"It is averred in the complaint that the legislature never regulated the tolls and freights to be charged by appellant, and the question is, was such regulation required by the charter as a condition precedent to the state's right to the earnings in excess of the amounts specified? It is obvious from the sections quoted that the lawmakers had in mind a scheme which contemplated not only liberal profits to investors, but, as well, security to the

public against extortion, and a contingency in which the common school fund should become entitled to share in the profits of the enterprise. The provisions of these sections may be better understood by looking at them from the point of view held by the legislators at the time of their enactment. Since the occupation of the territory the people of the state had sorely felt the need of highways as means of intercommunication and for reaching the markets. At that time perhaps more laws had been passed by the legislature relating to roads than had been passed upon all other subjects combined, and to meet the still pressing demand the state in 1836 had undertaken a general system of public improvements, which provided for the construction of many highways, including turnpikes, canals and railroads. This venture on behalf of the state had proven disastrous, and all work begun thereunder had been abandoned as early as 1842; leaving the state with a prostrate credit, and unsupplied with necessary highways. Furthermore, popular education had also been a matter of chief concern. In the organization of the state government in 1816 the people had declared, as a part of their fundamental law, for a public school system in which instruction should be free and equally open to all. Article 9, section 2. Subsequent legislation in accord with the constitutional requirement had given unmistakable prominence to the desirability of free schools. Most, if not all, of the financial resources of the state, other than taxation, had been and were being appropriated to the accumulation of a permanent fund for the maintenance of such schools. Here, then, we

find the legislature confronted with a popular demand for more highways and a more ample school fund. The state could neither build roads nor appropriate school funds. She had no money and no credit. Private capital must be induced to engage in such enterprises. Railroads, as freight carriers, were at the time attracting prominent attention. Massachusetts had led in 1826 in the construction of the first railroad in America, the same being a line from Quincy to tide water; and so rapidly had such roads arisen in favor, that in 1847 there were in successful operation more than 5,000 miles of railroad in the Eastern and South Atlantic states. 14 Am. Cyc. Our own state had felt the impulse of railroad building. No less than twenty-five charters for the construction of railroads had been previously granted, but none had proceeded to completion. In 1836, in its great system of internal improvements, the state had provided for the construction of a railroad from Madison to Lafayette, via Columbus, Indianapolis and Crawfordsville; thus opening up to general markets, through the Ohio river and the Wabash and Erie canal, three populous and fertile sections of the state. The latter work was entered upon, but the state, finding that it had undertaken more than it was able to accomplish, in 1843 turned over to a private corporation the incompleted portion between Madison and Indianapolis. The receiving company's president in February, 1846, reported to his board of directors that the road still lacked thirty miles of reaching Indianapolis. It was probably completed in that year. So it may be assumed that the legislature of 1847, convening so shortly after the

opening of the first railroad in the state, while in a mood to give friendly consideration to the proposals of a body of men to build with their own money a railroad through another important section of the state, yet the members were undoubtedly without the necessary data as to cost of construction and equipment, expenses of operation, and earnings of railroads to enable them to settle upon definite terms and franchises, fair alike to the corporation and the public. There existed reasons, too, why an east and west line across the state from Terre Haute to Richmond should be regarded as the most profitable line in the state for a railroad. The route for the entire distance paralleled the national road, a great thoroughfare previously constructed by the federal government, eighty feet wide, from Maryland to the Mississippi river; thus furnishing the rapidly increasing population of the seaboard a spacious highway into the broad and fertile regions of the west. Along this only way the stream of emigration had flowed for several years. Cities, towns and populous communities had gathered along its borders. New settlements sought continuity with it. National attention had been drawn to it as the only highway between the east and the west under the fostering care of the national government. The proposed new railroad was thus to run along the channel of direct commerce and communication, as fixed by congress, between the Atlantic and Mississippi valley, and would be the first to enter the open door of the great prairies of Illinois. At any rate, when the subject came up the legislators were not so swerved by their enthusiasm for railroads

as to make reckless concessions to the incorporators; for, liberal as they were required to be, and were, to induce the investment of private means in a novel venture, it is very plain that they had, from present considerations of some character, confidence enough in the ultimate profits of the enterprise to set a limit to the corporation's money making. The paramount consideration, doubtless, was such a scheme as would attract private capital. Here are some of the inducements held out to investors: (a) The company was to have, at the beginning of business, unrestrained power to charge such rates for the transportation of freights and passengers as seemed to it to be to the interest of the company, and power to raise and lower such rates at pleasure. Section 22. Under this power it could have been pointed out that the managers of a railroad, susceptible of easy and inexpensive construction, linking the west to the east, tracing the thickly inhabited border of the national road, touching at the state's capital, could unquestionably so adjust its tariffs as to meet the requirements of a satisfactory investment. (b) In effect, the state proposed to suspend the exercise of its sovereignty, and allow the company to continue uncontrolled and uncontrollable in its exactions from the people, until the investors had received back as dividends the full sum invested, and 10 per centum per annum thereon, and to thereafter continue in perpetuity to charge and collect such tolls as would net them two and one-half times the legal rate of interest. (c) The state guaranteed that the company should enjoy in perpetuity the right to charge such tolls as it liked, upon failure of the builders to receive back

as dividends the full sum invested, and 10 per centum thereon, and, if at the end of twenty-five years (section 35) the state elected to purchase the road, it could do so only by paying the stockholders the full cost of the road, and 10 per centum thereon. (d) The state should never, even after the builders had been fully reimbursed, interfere in the matter of charges so as to reduce the profits of the stockholders below 15 per centum per annum.

"The legislature was not free to do as it would. It had to do the best it could. The state's effort at making public improvements had irretrievably failed. Private capital must be enlisted, or the people do without railroads. The best offer to make was one that would promise investors the speediest and surest return of their money, and, to that end, give them the most absolute control of the means by which the money was to be made. That accomplished, other interests might then be protected. So it was provided (section 23) that when the stockholders had been reimbursed, and had received back all they had put in, and 10 per centum per annum thereon, and still retained their shares, the state should then become entitled to resume its sovereignty, and the cherished school fund afforded a chance for enlargement. The language is that when the money invested, and interest, had been fully returned, 'the legislature may so regulate the tolls and freights that not more than 15 per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses, and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state for

the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of 15 per centum per annum can not be made.' The situation of the legislature was unique. The fiscal depression that followed the collapse of the state's recent undertakings had not been restored. The people were clamoring for better ways of reaching the markets. The expenses and earnings of a railroad were problematical. How generally the people would patronize the road was only conjectural. The profits might be small or very large. One seemed as probable as the other, and, when the inducements had been made sufficiently strong to assure the investment of private capital on the basis of small profits, then, on the basis of possible large profits, there arose the twofold duty of protecting the people from continued wrong and oppression, and to secure for the state something valuable for the large franchises granted. Reasonable capitalists would not hesitate to accede to such terms when it was provided that they should operate only after the investors had received back all their investments, with interest largely in excess of the legal rate. With these various interests, objects and purposes in view, the plan outlined in section 23 was adopted.

"At least three reasons appear for believing that the intention was that the stockholders should not, after becoming reimbursed for their outlay, at any time or under any conditions, have more of the net earnings than 15 per centum per annum of the sum invested: First. The irrevocable right to 15 per centum, expressly conferred, negatives a right to more. Second. The faithful account of con-

struction, of expenses and receipts required by sections 23 and 35, and the mandatory language employed in disposing of the 'surplus,' implies the contemplated existence of a substantial balance. It seems entirely improbable that the legislature intended the mockery of providing for the payment to the school fund of the fraction remaining after that body had adjusted the tariffs of the company so that the net earnings should be just 15 per centum of the shareholders' investments—no more and no less. Third. It is clear that the lawmakers considered that under their liberal grant the time might come when the corporation would be receiving larger profits than were just, and when that time arrived, if ever, any earnings in excess of fairness should be relinquished by it. The limitation that entered into this consideration is stated as affecting the periods both before and after full reimbursement of the builders, and it seems incredible that the legislators should deem it expedient to declare their sense of what was just and fair to the shareholders and state, dispose of the excess over the limit fixed by them, and then provide, or leave for construction, that the company's right to the unjust excess should accrue by legislative inaction on the subject of regulating its tolls.

"But it is argued that the statute required the legislature to regulate the tolls and freights of the company, as a condition precedent to the state's right to the earnings in excess of 15 per centum; and in support of the contention it is insisted that 'may so regulate,' as used in section 23, should be read, 'shall so regulate.' We are unable to accept the argument as sound. If 'may' should be con-

strued as mandatory, when shall the legislature begin to act? The statute says 'when the aggregate amount of dividends declared shall amount to the full sum invested and 10 per centum per annum thereon' shall be the time when the legislature may begin regulating the tolls. It is certain, however, that conditions might be such at that time, and even after, for that matter, that the legislature would have no power to act. The stockholders might have reached reimbursement by earnings less than 15 per centum per annum, and the time might never come when they earned so much as 15 per cent. per annum; and hence the power to regulate, declared to exist, would be, and might ever continue to be, without the right of exercise, and therefore a nullity, for it is expressly provided in the same section 'that the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of 15 per centum per annum can not be made.' The legislature will not knowingly command a thing to be done that is impossible of accomplishment, nor will it willingly command a thing to be done that ought not to be done. Perchance it might happen when the time came that the stockholders had received back their full investment, and were continuing to receive more than 15 per centum per annum, that the state ought not to change the established and prevailing rates of the company. It should be borne in mind that the right to regulate was primarily intended for the protection of the people. All the protection the people were entitled to was fair rates, as compared with the rates elsewhere charged on other roads over the country. The railroad company

might find from experience that the friendship of the communities traversed was valuable, and that the interests of the company lay in such fair rates as would invite business and stimulate trade. So when the legislature became entitled to interfere it might find a schedule of rates in force by the company that was perfectly fair and perfectly satisfactory. In such case, will it be said that it was meant that the legislature should change it? Then, again, as we have seen, the proposed road would occupy a route of exceptional advantages for business—advantages apparently so favorable that a schedule of charges fair and necessary on other railroads in the state might upon this prove sufficient to produce an income in excess of 15 per centum. In such case was it intended to make it the duty of a subsequent legislature to reduce the rates of the company to the lowest point at which 15 per centum could be made? It is the duty of the state to treat its citizens alike, and to see that others who exercise public powers do the same. So when the state should undertake to regulate the tariffs of its railroads, it must make such tariffs uniform. It could not require the people between Indianapolis and Terre Haute to pay one mileage rate, and the people between Indianapolis and Madison to pay another. If the legislature should find such facts existing with respect to rates when the state regained its power of supervision, there would exist not only no duty to change the rates it found in force, but it would be wrongful to change them. Will it do to believe that it was meant by the legislature, in the adoption of appellant's charter, or so understood by the incorporators at the time of the acceptance, that

if it should turn out that fair rates formulated and established by the company should produce more net profits than 15 per cent. of the investment, the state must go through with the form of adopting and enacting into law the same fair rates, to acquire a right to the surplus? The intent of the law is the law. The reasonable and true interpretation of the provisions under review seem to be: First, that the matter of regulating the tolls and freights of appellant at any permissible time rested solely in legislative discretion; second, the incorporators were absolutely limited, in the profits of the enterprise, to the full sum invested, and 10 per centum per annum thereon, and thereafter to an annual dividend of 15 per centum upon the capital employed; third, when the stockholders had received the limit, the surplus, if any, remaining after the payment of expenses, and reserving such an amount as shall be necessary for future contingencies, should be paid over to the treasurer of state for the use of the common schools, without reference to whether the legislature had, or not, previously regulated the tolls and freights of the company. 'A doubtful charter does not exist, because whatever is doubtful is decisively against the corporation.' Com. v. Erie & N. E. R. Co., 27 Pa. 339-351, 67 Am. Dec. 471; Water Power Co. v. Lyman, 82 U. S. 500-511, 21 L. Ed. 133; Road Co. v. Sanford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Canal Co. v. Wheeley, 2 Barn. & Adol. 792; 4 Thomp. Corp. § 5661."

THE ADJUDICATION IN THE SUIT INSTITUTED IN 1875 IS NOT A BAR TO THIS ACTION. THE EVIDENCE OFFERED BY THE APPELLANT IN SUPPORT OF THE PLEA OF FORMER ADJUDICATION DID NOT SUSTAIN THE ANSWER. IT WAS INCOMPETENT, AND WAS PROPERLY EXCLUDED.

The answer will be found at page 47, and the reply thereto at page 52 of the record.

The items of evidence offered to support the answer were:

1. The agreement set out in the answer.
2. The proceedings in the *quo warranto* case.
3. The attorney-general's report of the agreement to the governor.
4. The complaint in the action begun in 1875.
5. The opinion of the superior court judge sustaining the demurrer to this complaint.
6. Joint resolution No. 16.
7. The judgment in the 1875 suit. (Record, pp. 592-624.)

The evidence was excluded by the master, and this ruling as to each item of the evidence, was made the basis of exceptions by the plaintiff in error. (Record, pp. 132-133.)

These exceptions were overruled by the trial court (record, p. 133), and the rulings affirmed by the supreme court. (Record, pp. 671-672.)

The complaint in the suit instituted in 1875 was bad, and the demurrer was properly sustained thereto, because it contained no averment of demand, demand being a necessary condition of the institution of such a suit.

The decisions of the trial court and supreme court upon this question were that the attorney-general had authority to bring the action, but that it was prematurely brought, as no demand for an accounting and payment of moneys sued for was alleged to have been made, and none had in fact been made, at the time the action was brought. This was held in the first instance upon the demurrer to the complaint (record, pp. 42-43), and again in overruling the demurrer of plaintiff in error to the reply to the third paragraph of answer, both of which rulings were affirmed in the supreme court.

Section 23 of the act of 1847 provided that: "It shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures, and the amount of profits after deducting all expenses, which statement shall be made under the oath of the officer whose duty it shall be to make the same."

In 1875, at the time of the institution of the suit in question, the legislature had taken no action with reference to its rights against the appellant. It had not required any statement or report from the corporation, showing the conditions of its affairs upon which the legislature might base any demand or action that it might see fit to take to require the appellant to account with and pay over the amount, if any, that might be due it.

It is clear that under the provisions of section 23 of the charter, it devolved upon the general assembly to take action before it could be ascertained whether there was any amount due to the state from the appellant; and until

such statement was required and made, or until such time as the general assembly should take action with reference to the matter by either demanding an accounting, or authorizing some officer of the state to do so, the state had no present right of action against the appellant, and this action never having been taken previous to 1875, there was no authority in any officer of the state to institute suit against the appellant, and the suit so brought was premature, and instituted before the necessary steps had been taken to entitle the state to recover.

As we have said, before the right of action matured, it was necessary that the general assembly should have taken action with reference to the matter; that a demand for an accounting should have been made upon the appellant, and the appellant required to account for and show what amount, if any, was due the state under the provisions of section 23, and until this demand was made, no right of action accrued. The money due from the appellant was held by it in trust for the treasurer of state for the benefit of the common schools. It was lawfully in the possession of the appellant, therefore, a demand for an accounting and payment was necessary before a suit could be instituted.

If, therefore, a demand was necessary, the suit instituted in 1875 was prematurely brought, as at that time no right of action had accrued, nor did it accrue until the general assembly had acted, and it had not, at that time, made any demand, or required any statement from the appellant; so the suit instituted in 1875 was brought prema-

turely, and is not a bar to this action, and the state is not estopped by the judgment rendered in that cause.

A suit prematurely brought is not a bar to a suit subsequently brought after the cause of action has properly accrued.

Brackett v. People, 115 Ill. 26;
Krapp v. Eldridge, 33 Kans. 106;
Seaton v. Hixon, 35 Kans. 663;
Roberts v. Norris, 67 Ind. 386-392;
Griffin v. Wallace, 66 Ind. 410-418;
Indianapolis, etc., Co. v. Clark, 21 Ind. 150-153;
Kirkpatrick v. Stingley, 2 Ind. 269-273.

The authorities cited by the plaintiff in error to sustain their contention that no demand was necessary, and therefore that it was not necessary to aver a previous demand in the complaint filed in 1875, are not in point, as they are cases in which the time for the payment of money was fixed by contract or by law, and in which there was an absolute duty to pay at a fixed time, imposed upon the party liable to pay the money. As we have seen, under section 23 of plaintiff in error's charter, there was no fixed time for the payment, and no action could be taken until such time as the legislature should act.

The issues involved in the case at bar are not the same as those presented by the case brought in 1875. In the complaint in the case instituted by the attorney-general in 1875, there was no allegation of demand having been

made by the state, and no showing of any action taken upon the part of the state through its legislature.

The case at bar, as shown by the complaint, was brought after a demand made, in pursuance of the act of the legislature of March 4th, 1897, instructing the attorney-general to demand an accounting and payment, and to enforce the collection of any amount due to the school fund. Therefore there is a very marked difference between the issues involved in the two actions.

It is well settled that a judgment on the merits of the cause of action is a bar to any future suit for the same right. It is also well settled that if the record in the former suit is ambiguous, and does not show what was decided, or, if there were two or more issues that might have been decided, extrinsic evidence may be introduced to explain the record, and show what was, in fact, decided, but such evidence is never allowed to contradict the record, or to show that issues not presented by the record were decided. The cases cited in appellant in error's brief, are all, we think, of this character.

It is also settled law that a judgment on demurrer going to the merits of the case, falls within this rule, for the reason that it can make no difference whether the facts are admitted, or are found from the evidence; when once established the decision on them is final. So far, a judgment on demurrer and a judgment after trial, are identical in effect, but there is a wide difference between a judgment for the defendant on a demurrer to the complaint, and judgment on other demurrers. The rule as to such judgments is, that a judgment for the defendant on demurrer

to a bad complaint is no bar to a subsequent action for the same right on a good complaint.

Stevens v. Dunbar, 1. Blackf. 56;
Sherry v. Foresman, 6 Blackf. 56;
Estep v. Larsh, 21 Ind. 190.

When a new declaration by new averments would not be demurrable, the second suit is not barred, as the issues are changed.

24 Am. and Eng. Enc. Law (2d edition) 800.

In Gould v. Evansville, etc., Railroad Company, 91 U. S. 526, the court, after stating the general rule applicable to judgments, rendered on demurrers, says, on page 534:

> "Support to those propositions is found everywhere; but it is equally well settled that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." Citing:
>
> Gilman v. Rives, 10 Pet. (U. S.) 298;
> Aurora City v. West, 7 Wall. 90;
> Richardson v. Barton, 24 How. 188.

In Gilman v. Rives, the court said, at page 301:

> "The objection may be urged, that the judgment upon a general demurrer, in this case, will be a

> good bar to any future suit brought against the present defendant, upon the same debt, or against him and the other judgment debtor. We are of a different opinion as to both if the declarations be properly framed; for a judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment upon the merits."

The same point is decided in:

Post v. Pearson, 108 U. S. 418;
Smith v. McNeal, 109 U. S. 426;
Hughes v. United States, 4 Wall. 232.

See also to this point:

Wilbur v. Gilman, 21 Pick. 25;
Lepping v. Kedgewin, 1 Mod. 207.

This distinction is fundamental, and appears plainly when it is considered that the reason for allowing a judgment on a demurrer to act as an estoppel is, that by such demurrer the facts pleaded are admitted. So, if the plaintiff's demurrer to the answer is overruled, and judgment is entered against him, he has admitted the facts set forth in the answer to be true, and the court has decided that such facts are a good defense to his claim.

So, too, if judgment is rendered on a decree overruling the defendant's demurrer to the complaint, the facts set forth in such complaint are admitted to be true, and the

court has decided that such facts entitle the plaintiff to recover. In both these cases the merits were decided; the facts by admission of the parties, and the law as applied to these facts, by the court.

But when the defendant demurs to the complaint, the plaintiff admits nothing. The defendant admits the facts set forth to be true, but the plaintiff does nothing except to maintain that those facts set forth in his complaint entitle him, as a matter of law, to recover. On the other hand, the defendant, by his demurrer, asserts that they do not entitle the plaintiff to recover, and that is the only issue raised by the pleadings for the court to decide as against the plaintiff. He is asserting nothing else; he is admitting nothing.

The statute under which the demurrer is permitted, provides that "the defendant may demur to the complaint when it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action."

1 Burns R. S. 1901, §342 Subdiv. Fifth.

The ground for demurrer is, that the "complaint does not state facts" that entitle the plaintiff to recover. So the issue, and the only issue raised is, whether the precise facts set forth entitle the plaintiff, as a matter of law, to maintain that action. When the court sustains the demurrer, it passes upon that question, and that question only, and does not assume to say that, if in addition to the facts set forth, another fact was pleaded, the complaint would

be good or bad. That would be passing upon an issue not raised by the pleadings, and could not be decided if such fact were not pleaded. Since the court can only pass upon the issues raised by the pleadings, extrinsic evidence is not admissible to show that, in ruling on a demurrer, it ruled, not that the complaint demurred to was bad, but that a complaint containing the same facts, together with any other facts the plaintiff might put into it, would be bad. That would be a direct attack upon the record by an attempt to show that an issue was decided by the judgment that could not possibly arise from the pleadings. "It is not competent for the court, in any event, to conclude the parties in respect to any matter which was not included within the issues."

McFadden v. Ross, 108 Ind. 512.

This distinction between a judgment sustaining a demurrer to the complaint and one sustaining a demurrer to an answer, was recognized and applied by the supreme court of Indiana in the case of Wilson v. Ray. In that case the defendant pleaded, in bar to the action, a former judgment overruling a demurrer to the answer, and the court, in distinguishing the case of Stevens v. Dunbar, 1 Blackf. 56, cited above, said:

> "In that cause (Stevens v. Dunbar), the judgment relied on as a bar was rendered in favor of the defendant upon a demurrer to the declaration. In such a case, in the nature of things, the judgment could not be a bar to a subsequent suit, founded on a good complaint, for therein would be

> the difference between the former and latter action. But a judgment on a demurrer to a good defense, in favor of the party pleading it, is a bar to a subsequent suit for the same cause of action, for the plaintiff, by his demurrer, admits of record the truth of the answer."
>
> Wilson v. Ray, 24 Ind. 156.

So the rule that a judgment for the defendant on a demurrer to a bad complaint can never be a bar to a subsequent suit for the same right on a good complaint, applies in every case, for the reason that the only question that could be decided in the first case was, that the complaint in that case was bad, and not that a complaint containing additional averments, which made it good, would be bad. The mere statement of such a thing shows its absurdity.

A comparison of the complaint in the former case and the present complaint will show that they differ in that the present complaint alleges that a demand was made on the part of the defendant in error for the money due it under the appellant's charter, and that this demand was made subsequent to the rendition of the final judgment in the former case, and that such demand was made in compliance with the action of the general assembly requiring it to be done.

In the former complaint no such demand was alleged, but in other respects the complaints are substantially the same. Lacking this averment, it is admitted that the complaint was bad, and the court having so decided when the issue was raised by demurrer, and having rendered judgment for the defendant, the defendant in error is estopped

to bring another suit by a complaint stating no additional facts. But that judgment is no bar to the present suit, brought on a complaint made good by the additional averment of a demand made pursuant to the requirements of the general assembly. To hold otherwise it would be necessary to say that the court, in the former case, held that the facts stated in the complaint in that case, together with the fact not stated, of a demand, did not entitle the plaintiff to recover. In other words, that it injected an issue into the case which the parties themselves had not placed there, and then decided that issue. The defendant, by its demurrer, did not admit that there had been a demand, nor, if the defendant had answered instead of demurring, could the plaintiff have introduced evidence of a demand on the trial. Since that is so, it is impossible to argue that the fact of a demand was in issue, and if it was not in issue, the court had no right to decide that the facts which were in issue would not have constituted a cause of action if a demand had been in fact alleged.

This is obviously the meaning of the rule that a judgment for the defendant on a demurrer to the complaint does not bar a subsequent action on a good complaint. In other words, it means that a general demurrer to a complaint only puts in issue the sufficiency of that complaint, and in sustaining the demurrer to it the court only decides, and can only decide, that one question, and never decides as to the sufficiency of another complaint presenting a good cause of action, for the reason that the question of the sufficiency of the second complaint is not before it.

THE EVIDENCE OFFERED IN SUPPORT OF THE ANSWER WAS PROPERLY EXCLUDED.

The proposition that the former judgment was not a good bar to the present action involved the exclusion of the record of that judgment, when, upon being offered in evidence it appeared upon the face of the proceedings that the complaint did not aver or show that a demand had been made.

The record shows what the issue in the former case was, and is not doubtful or obscure; there was no other issue that might have been decided, so there was no reason or room for the admission of extrinsic evidence, whether parol or written, to show what was decided.

And, therefore, the evidence offered outside of the record, in support of the appellant's plea of former adjudication, was not competent, and was properly rejected. The opinion of the judge was not made a part of the record of the former suit by order of the court, or bill of exceptions, and was no part of the record.

1 Burns R. S. 1901, §662.

It was as much extrinsic evidence as would have been an oral statement of the judge as to the grounds of his decision made outside of court.

State ex rel. Yancey v. Hyde, 129 Ind. 296;
England v. Gebhardt, 112 U. S. 502, 506;
Insurance Co. v. Tweed, 7 Wall. 51;
Kentucky Ins. Co. v. Hamilton, 63 Fed. 93.

It was properly excluded for another reason.

The answer did not allege that the opinion had been given, or in any manner aver or show its contents either in the body of the answer, or as an exhibit. See the answer as set out in the record, page 47. The fact that such an opinion had been given was therefore not admitted by the filing by defendant in error of a reply merely in confession and avoidance.

1 Burns R. S. 1901, §§367, 386.

It could not be received in evidence, even if otherwise competent, without proof that it was in fact the opinion given by the court. Such proof was not made or offered, and this, if there were no other objection, is enough to show that no error was committed in excluding the opinion. It is well settled that such rulings will be sustained upon any sufficient ground that in fact existed, although neither the objection nor ruling were at the time placed upon such ground. The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed.

McClung v. Silliman, 6 Wheat. 598, 602;
Penn. Railroad v. Wabash Railway, 157 U. S. 225, 229;
Silsby v. Foote, 14 How. 218;
Baldwin v. Threlkeld, 8 Ind. App. 312.

Respectfully submitted,

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Of Counsel.

Supreme Court of the United States.

No. 264.—October Term, 1903.

The Terre Haute and Indianapolis Railroad Company, Plaintiff in Error, *vs.* The State of Indiana ex rel. William A. Ketcham, Attorney General. } In error to the Supreme Court of the State of Indiana.

[May 31, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the State of Indiana to ascertain and to recover from the plaintiff in error the total net profits made by the latter over fifteen per cent on the true cost of construction of its railroad, from the time when the net earnings equalled that cost with ten per cent on the same added. The claim of the State was made under § 23 of the charter of the railroad, approved January 26, 1847, and four acts of 1897 to be referred to. The complaint admits, and the answer sets up, a surrender on January 17, 1873, of the charter of 1847, on which the supposed obligation was based, and an acceptance of the general railroad law by the company, and also a judgment for the company in March, 1876, on a former complaint for the same cause. The answer also makes a general denial and invokes the Fourteenth Amendment and other relevant parts of the Constitution of the United States. The case was referred to a master, who ruled that the former judgment was not a bar, but ruled also that the company was not liable. The superior court ruled the other way and gave judgment against the company for $913,905.01. This judgment was affirmed by the Supreme Court of the State, and the case then was brought here by writ of error.

By § 22 of the charter the railroad is given absolute discretion in the fixing of charges. Then, by § 23: "When the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving?] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per

annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses," &c. By § 24: Semi-annual dividends of so much of the profits as the corporation may deem expedient are to be made, and "the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper." By § 35, repealed in 1848, the corporation is to keep a fair record of the whole expense of making and repairing its road, &c., and also a fair account of the tolls received, and the State is to have the right to purchase the stock of the company after twenty-five years for a sum equal, with the tolls received, to the cost and expenses of the railroad with ten per cent.

The complaint relied also upon an amendment of section 23, on February 24, 1897, attempting to make the above mentioned surplus profits a debt and to make the company accountable from the beginning of such profits. The complaint still further relied upon an act of January 27, 1897, requiring the railroad to account; an act of March 4, 1897, appropriating the net earnings of the company above fifteen per cent, &c., as above, to the use of common schools, and authorizing a demand and a suit; and an amendment of the general railroad law on February 18, 1897, after the surrender of this company's charter, providing that all liabilities to the State, whether inchoate or complete, under special charter, were and should be reserved, notwithstanding the past or future acceptance of the surrender of such special charters.

The Supreme Court, while agreeing that the right of the State must depend on the original charter, did give force to this later legislation, in terms, as providing a remedy, and, on the construction which we are compelled to give to the charter, did also give force in fact to the amendment to the provision attempting retrospectively to save the charter obligations after a surrender had been accepted. Therefore the question is properly here whether these statutes impaired the rights of the railroad under the Constitution of the United States. For in order to determine whether the later legislation impairs those rights, this Court must decide for itself what those rights were. If in the opinion of this Court the State had lost all right to demand any sum whatever under § 23 of the charter, legislation necessary to enforce such a demand is invalid and may be pronounced so by this Court, notwithstanding the fact that the cause of action now is based upon the original act. We shall recur to the question of our jurisdiction after discussing the merits of the case, which we must do to make what little we have to add plain.

The Supreme Court of the State seems, although it is not clear, to have construed § 23 as creating by itself alone a debt to the State which accrued as fast as surplus profits were realized, which, under that section,

might have been required to be paid over to the treasurer of State. It is pointed out that in 1847 the State had no credit and was in need of roads and schools, and that therefore it was natural to provide for the handing over of any surplus after a liberal return to the owners of the road. It is thought that the express grant of an absolute right to fifteen per cent negatives the right to more, that the provisions for an account in §§ 23 and 35 and the mandatory language as to the surplus confirm this result, and that it is unreasonable to suppose that the legislature, after indicating what by the agreement of the parties would be a fair demand of the State, should leave the right of the State in abeyance until a future legislature should choose to act. In this way the amendment of § 23 in 1897 is practically carried into effect. While repudiated as legislation it is adopted by construction, and is found to express only the meaning of the original act.

We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a State Court upon State laws. The language is plain. The legislature "may so" regulate tolls "that" not more than fifteen per cent shall be divided, "and" the surplus profit shall be paid over. The word "may," it is agreed, is permissive, not mandatory. In the next place it is only upon its regulation of tolls, so that not more than fifteen per cent shall be divided, that dividends are confined to that sum. Otherwise the general power, given by § 24, to declare such dividends as the company deems expedient, remains in force. Finally, the payment over of the surplus profits above fifteen per cent is not a separate, independent and absolute mandate, but is connected with "so regulate tolls that" by "and." Like the cutting down of dividends, it is a result of the regulation. Again, the duty of the corporation to furnish the legislature a statement of expenditures is only "if required." It might be required in order to be certain whether it was advisable to regulate tolls. Pehaps if the legislature had regulated them it might be required in order to find out what was due. The provision for a record and an account in the repealed § 35 seems to us to have little bearing. They were required there, primarily at least, with reference to the possible purchase of the stock by the State. We infer that the State courts considered the words "regulate tolls" to refer solely to fixing the amount to be charged, and regarded the payment over of the surplus as an independent mandate. It seems to us that the words as here used meant more, and embraced not only fixing the amount to be charged to the public, but an order for the division of earnings between the railroad and the schools. The provision as to the surplus over fifteen per cent is not sufficiently accounted for if the regulation of tolls is intended to make the profits as near fifteen per cent as may be.

Not only the absolute discretion as to dividends given by § 24, but the similar discretion given by the same section as to the proportion of profits to be retained, confirms the grammatical construction of § 23. Circum-

stances might change, and knowledge might change. It is agreed that they did not know much about railroads in 1847. The corporation was allowed to make and to distribute or retain such earnings as it could, subject to the power of the State in certain events to require it to pay over extra profits, or to sell its stock. But which, and whether the State would make either demand, was left undecided, and until the State elected the whole earnings of the company were its own.

It follows that when the company surrendered its charter in 1873, there having been no attempt by the State to regulate tolls before that time, the company was free from liability or the possibility of demand. Therefore it is only by attempting, as it did attempt in its complaint, to apply the subsequent amendment of the general railroad law that the State can come into court. That law, it will be remembered, purported retrospectively to save rights under surrendered charters. It does not need argument to show that this amendment could not affect the plaintiff.

The case then stands thus: The State Court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the State Court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Louisville Gas Co.* v. *Citizens' Gas Light Co.*, 115 U. S. 683, 697. We may add that it is admitted that one of the acts of 1897 was necessary to authorize a demand and so to create a cause of action. It was for want of an authorized demand that the former suit was held no bar. But in our opinion the State had no right in 1897 to make a demand.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.